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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1938

## No. 30

THE COLORADO NATIONAL BANK OF DENVER AND GERTRUDE HENDRIE GRANT, EXECUTORS OF THE ESTATE OF EDWIN B. HENDRIE, DECEASED, PETITIONERS,

*vs.*

COMMISSIONER OF INTERNAL REVENUE

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR CERTIORARI FILED MAY 2, 1938.

CERTIORARI GRANTED MAY 31, 1938.

# SUPREME COURT OF THE UNITED STATES

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INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 28, 1938.

—6395

[fol. a] [Caption omitted]

[fol. 1]

**BEFORE UNITED STATES BOARD OF TAX APPEALS**

**Docket No. 78040**

THE COLORADO NATIONAL BANK OF DENVER and GERTRUDE HENDRIE GRANT, Executors of the Estate of Edwin B. Hendrie, Deceased, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances: For Petitioners: Erl H. Ellis, Esq., C. Clifton Ownes, Esq., (Withdrawn) For Respondent:

DOCKET ENTRIES

1934.

Dec. 8. Petition received and filed. Taxpayer notified. (Fee paid)

Dec. 8. Copy of petition served on General Counsel.

1935.

Jan. 30. Answer filed by General Counsel.

Feb. 5. Copy of answer served on taxpayer.

March 11. Motion for circuit hearing at Denver filed by taxpayer 3/11/35 granted.

1936.

May 19. Stipulation waiving hearing filed.

May 19. Motion to fix time for filing briefs—45 days for petitioner, 45 days thereafter for respondent's brief and 15 days after respondent's brief for petitioner's reply filed by taxpayer.

May 19. Stipulation of facts filed.

May 26. Order granting petitioner until 7/5/36 to file brief—Commissioner 45 days from date of petitioner's brief and petitioner shall have 15 days from date of Commissioner's brief to file reply; and that proceeding be assigned to Mr. Murdock, Division 3, entered.

[fol. 2] DOCKET ENTRIES—Continued

1936.

July 6. Brief and request for findings of fact filed by taxpayer. 7/7/36 copy served.

Aug. 17. Brief filed by General Counsel.

Sept. 8. Reply brief lodged embodying motion for permission to file reply brief filed by taxpayer.

Sept. 12. Motion for leave to file reply brief out of time granted. 9/14/36 copy served.

Sept. 19. Memorandum opinion rendered—J. E. Murdock, Division 3. Decision will be entered under Rule 50.

Oct. 13. Notice of settlement filed by General Counsel.

Oct. 15. Hearing set Nov. 4, 1936 on settlement under Rule 50.

Oct. 24. Consent to settlement filed by taxpayer.

Nov. 9. Decision entered—J. E. Murdock, Division 3.

1937.

Jan. 30. Petition for review by U. S. Circuit Court of Appeals, 10th Circuit, with assignments of error filed by General Counsel.

Feb. 5. Proof of service filed by General Counsel. (Service on taxpayer.)

Feb. 5. Proof of service filed by General Counsel (on attorney for taxpayer).

March 25. Motion for extension to 6/1/37 to prepare and transmit record filed by General Counsel.

March 25. Order enlarging time to June 1, 1937 to prepare and transmit record entered.

April 26. Notice of the withdrawal of C. Clifton Owens, counsel for taxpayer, filed.

April 27. Praecipe filed with proof of service thereon.

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[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

PETITION—Filed December 8, 1934

The petitioners above-named hereby petition for a redetermination of the deficiency set forth by the Commission of Internal Revenue in his notice of deficiency MT-ET-CL-1344-Colorado), dated September 13, 1934, and as a basis for their proceeding allege as follows:

1. The petitioners are the Executors of the Estate of Edwin B. Hendrie, deceased, having been duly appointed by the County Court of the City and County of Denver, State of Colorado, on the eighth day of August, 1932. The Colorado National Bank of Denver has its office at Champa and Seventeenth Streets, Denver, Colorado, and Gertrude Hendrie Grant has her residence at 7020 East Twelfth Avenue, Denver, Colorado.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) is dated September 13, 1934, and the petitioners are informed and believe it was mailed to them on said date.

3. The taxes in controversy are estate taxes for the Estate of Edwin B. Hendrie, deceased, and for $188,108.28.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) Respondent erred in increasing the valuation of certain stocks and bonds, owned by the decedent at the time of his death, in the following amounts:

| | |
|---|---|
| 25 Central Irrigation District 6 per cent Refunding Bonds, Series 8, due January 1, 1929, increased from $10.00 to $100.00 per bond, such increase being | $2,250.00 |
| 1,000 shares Acetol Products, Inc., Convertible 'A' stock, no par value, increased from $4.00 to $5.00 per share, such increase being | 1,000.00 |
| 1,000 shares Associated Telephone and Telegraph Co. class 'D' common stock, no par value, increased from $2.00 to $3.00 per share, such increase being | 1,000.00 |
| 1,050 shares Hendrie and Bolthoff Manufacturing and Supply Co. common stock, par value $100.00 per share increased from $170.00 to $200.00 per share, such increase being | 31,500.00 |
| Total | $35,750.00 |

[fol. 4] and thereby wrongfully increased the gross estate in the aggregate sum of $35,750.00 by reason of the above over-valuation of the said stocks and bonds.

(b) Respondent erred in including in the gross estate the properties at decedent's death in a trust created by the decedent during his lifetime by a certain written instrument dated January 7, 1927, thereby wrongfully increasing the value of the gross estate in the amount of $1,034,074.22. A true copy of said trust agreement is hereto annexed, marked Exhibit B, and made a part hereof.

(c) Should it be held that the properties transferred by the decedent during his lifetime by the trust agreement referred to in paragraph (b) above should be included in the gross estate, in that event respondent erred in the valuation of such properties in amounts different from their actual values at the date of decedent's death, as set forth in Part II, of Exhibit D, hereto attached.

(d) Respondent erred in failing to make proper provision on account of expenses that will be incurred in the further administration of the estate, the exact amount of which has not yet been ascertained.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

Generally, that decedent died on July 15, 1932, a resident of the State of Colorado.

Specifically, as respects the alleged instances of error:

(a) That the following stocks and bonds at the time of decedent's death did not have a value in excess of the amounts set opposite the same in the list thereof given below, namely:

| | |
|---|---|
| 25 Central Irrigation District, 6 Per Cent Refunding Bonds, Series 8, due January 1, 1929 | $250.00 |
| 1000 shares Acetol Products, Inc., Convertible 'A' stock no par value | 4,000.00 |
| 1000 shares Associated Telephone and Telegraph Co., class 'D' common stock, no par value | 2,000.00 |
| 1050 shares Hendrie and Bolthoff Manufacturing and Supply Co., Common stock, par value $100.00 per share, | 178,500.00 |

[fol. 5] (b) The respondent in the aforesaid notice of deficiency, (Exhibit A, hereto annexed), asserts he sustains

the tentative finding that the properties which were transferred by the decedent by the trust agreement of January 7, 1927, (Exhibit B, hereto annexed), should be included in the gross estate as a transfer under the provisions of Section 302 (c) of the Revenue Act of 1926. A true copy of the respondent's tentative finding, being a letter addressed to the petitioners on January 23, 1934, is hereto annexed, marked Exhibit C, and made a part hereof. In such tentative finding the respondent included the alleged value of the properties transferred by the aforesaid trust agreement in the gross estate as being a transfer having been made to take effect at or after death. In the statutory notice of deficiency (Exhibit A) the respondent has included the alleged value of the properties of such trust in the decedent's gross estate for the alleged additional reason that such transfer was made in contemplation of death.

The decedent executed said trust indenture of January 7, 1927, during his lifetime, when he was eighty years of age, when he was in good health, mentally and physically, with no feeling that death was near, and neither contemplation of death nor specific anticipation of death was the motive, or animating, actuating cause of the transfer. That said transfer was intended to be and was a gift inter vivos and not of a testamentary nature. That decedent's motive was to provide a specific fund for the natural recipients of his bounty and to place a large share of his assets beyond the danger of the results of his own planned speculations and to establish and protect his children.

That said transfer by such trust agreement was an irrevocable one, intended to take effect and taking effect in possession and enjoyment at the time thereof and not at or after the donor's death, and the donor did not retain any possession or enjoyment in the property or rights therein, and all economic benefits and burdens in and all control over the property passed completely from the donor at the time of the execution of said trust.

(c) The properties transferred by the aforesaid trust agreement had the values at the time of the decedent's death of the amounts set opposite the same in the list set forth in Part I of Exhibit D, hereto attached.

[fol. 6] (d) The administration of the estate has not yet been concluded. In the further administration various expenses must necessarily be incurred. The said deficiency

has been determined without any provision for the amount by which the net estate may be decreased by such expenses.

Wherefore, Petitioners pray that this Board may hear this proceeding and find:

(a) That respondent erred in increasing the values of certain stocks and bonds as set forth in paragraph 4 (a) of this petition and that such stocks and bonds had no greater value at the time of decedent's death than as set forth in paragraph 5 (a) of this petition;

(b) That the value of the properties embraced in said trust dated January 7, 1927, should be excluded from the gross estate in the computation of the net estate subject to tax, in accordance with the averments of paragraphs 4 (b) and 5 (b) hereof;

(c) That, if the value of the properties transferred by the decedent by the trust agreement dated January 7, 1927, should be held by this Board as properly includable in the gross estate then, in that event such values should not exceed those set forth in Part I of Exhibit D, made a part of this petition.

(d) That proper provision be made for expenses incurred and to be incurred in the further administration of this estate in accordance with the averments of paragraphs 4 (d) and 5 (d) hereof; and

For all such further and general relief as the facts and nature of the case may demand and as in the premises to the Board seem fit and proper.

Erl H. Ellis, 730 Equitable Building, Denver, Colorado. C. Clifton Owens, American Security Bldg., Washington, D. C.

[fol. 7] *Duly sworn to by Hugh McLean and Gertrude H. Grant. Jurats omitted in printing.*

[fol. 8] EXHIBIT "A" TO PETITION

September 13, 1934.

MT-ET-C1-1344-Colorado.
Estate of Edwin B. Hendrie.
Date of death—July 15, 1932.

The Colorado National Bank of Denver, et al., Executors,
Denver, Colorado.

SIRS:

A deficiency of $188,108.28 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver,

[fol. 9] Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully, Guy T. Helvering, Commissioner, (Signed) by Adelbert Christy, Acting Deputy Commissioner.

Enclosures: Statement, Waiver, Form 890.
ATC:FCH.

The estate's protest involves the contention that the Bureau's tentative findings that a trust created by the decedent on January 7, 1927, valued at $1,034,074.22 should be included in the gross estate as a transfer under the provisions of Section 320 (c) of the Revenue Act of 1926, was erroneous. A review of all the evidence in the record sustains the tentative finding. The Bureau has also determined that the value of the trust should be included in the gross estate for the additional reason that it was made in contemplation of death.

In view of the evidence presented by the estate showing the payment of $51,106.86 State inheritance taxes to the State of California, credit is allowed in that amount.

The tentative findings are hereby made final as to all changes shown in the tentative letter. The following is a summary statement of the tax liability as herein determined:

| | Returned | Tentatively Determined | Determined |
|---|---|---|---|
| Gross estate | $988,006.68 | $2,018,912.80 | $2,018,912.80 |
| Deductions (1926 Act) | 161,587.60 | 148,730.55 | 148,730.55 |
| Net estate (1926 Act) | $776,419.08 | $1,870,182.25 | $1,870,182.25 |
| Gross estate | $988,006.68 | $2,018,912.80 | $2,018,912.80 |
| Deductions (1932 Act) | 111,587.60 | 98,730.55 | 98,730.55 |
| Net estate (1932 Act) | $836,419.08 | $1,920,182.25 | $1,920,182.25 |
| Gross tax (1926 Act) | $33,085.14 | $121,816.40 | $121,816.40 |
| Credit for State estate, inheritance, legacy or succession taxes | 26,468.11 | 0.00 | 51,106.86 |
| Net tax (1926 Act) | $6,617.03 | $121,816.40 | $70,709.54 |
| [fol. 10] | | | |
| Total gross taxes (1926 and 1932 Acts) | $96,491.24 | $309,238.27 | $309,238.27 |
| Gross tax (1926 Acts) | 33,085.14 | 121,816.40 | 121,816.40 |
| Net additional tax | $63,406.10 | $187,421.87 | $187,421.87 |
| Net tax (1926 Act) | 6,617.03 | 121,816.40 | 70,709.54 |
| Total net tax | $70,023.13 | $309,238.27 | $258,131.41 |
| Deficiency | | | $188,108.28 |

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter if a petition is not filed with the Board of Tax Appeals $141,762.02 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by additional credit for State estate, inheritance, legacy or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of the Estate Tax Regulations 70 (1929) Edition. If, after a reasonable time the evidence is not filed, the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six percent per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

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EXHIBIT "B" TO PETITION

Memorandum of Agreement, entered into this seventh day of January, A. D. 1927, between Edwin B. Hendrie, of the City and County of Denver, State of Colorado, (hereinafter referred to as the "Donor"), and The Colorado National Bank of Denver, a national banking association doing business in the City and County of Denver, State of Colorado, (hereinafter referred to as the "Trustee"): Witnesseth:

That, Whereas, the Donor desires to create a trust for the use and benefit of certain beneficiaries hereinafter mentioned, upon the terms and conditions hereinafter set forth;

Now, Therefore, in consideration of the premises and for the purpose of accomplishing the objects hereinafter more particularly set forth, the Donor has sold, assigned, transferred, set over and delivered, and by these presents does [fol. 11] sell, assign, transfer, set over and deliver unto the said Trustee, all and singular, those certain securities and properties described as follows, to-wit:

$46,000 face value of Fremont County, Colorado, School District No. 1 Bonds.
$34,000 face value of Morgan County, Colorado, School District No. 3 Bonds.
$22,000 face value of Waco Custer Ditch Company Bonds.
$50,000 face value of Joint Stock Farm Loan Bank of Chicago, Ill., Bonds.

$25,000 face value of New Orleans, Texas & Mexico Railway Company Bonds.
$50,000 face value of The Ohio-Pennsylvania Joint Stock Land Bank of Cleveland, Ohio, Bonds.
$50,000 face value of Federal Land Bank of Springfield, Ill., Bonds.
$50,000 face value of Federal Land Bank of New Orleans, Bonds.
$50,000 face value of Missouri Gas & Electric Service Co. Bonds, Series A.
$50,000 face value of Union Pacific Railroad Company Bonds.
$50,000, face value of Central Power Company, Series C, Bonds.
$50,000 face value of Farmers Irrigation District of Scottsbluff, Nebr. Refinancing Bonds.
300,000 face value of Bosworth, Chanute Building Company Bonds.

And such other securities and properties as Donor may, from time to time, see fit to deposit hereunder.

First. Said Trustee shall receive, hold, manage and control, and in its discretion improve, lease (for any period whatsoever), exchange or vary, pledge, mortgage, sell and convey all or any part of the securities or other property at any time composing the trust estate, upon such terms and conditions as it may deem proper, and no person taking any such property or securities from said Trustee by way of sale, lease, mortgage, pledge or exchange shall be required to see to the application of the purchase money, or the rents, issues, profits or proceeds of such sale, lease, mortgage, pledge or exchange, or to inquire as to the authority of the Trustee in the premises. The Trustee shall collect and receive all [fol. 12] dividends, rents, issues, profits, interest and income of the trust estate and shall invest and reinvest all or any part of the principal thereof in real, personal or mixed property, and generally manage and control all of said trust property and all investments and reinvestments thereof in its absolute discretion without limiting such investments to the classes of securities or property which are now or may hereafter be prescribed by law as those in which trust funds shall be invested, it being the intention of the Donor to confer upon the Trustee with respect to the said trust estate

all of the powers of management and control that the Donor would have had were the Donor then in the sole and absolute possession and control of the property composing said trust estate; Provided, However, that during the lifetime of the Donor all sales of securities and all reinvestments of trust funds shall be approved by the Donor.

Second. The net income from all of the trust estate shall be treated as part of the principal of said trust estate and shall be invested and reinvested as such under the terms of this Trust Agreement during the lifetime of the Donor, and after the death of the Donor the net income from all of the trust estate, or so much thereof as Gertrude Hendrie Grant daughter of the Donor may call for, shall be paid to her by the Trustee so long as she shall live, and the portion of the net income received from said trust estate after the death of the Donor that is not called for by the said Gertrude Hendrie Grant shall be treated as part of the principal of said trust estate and invested and reinvested under the terms of this agreement. And upon the death of the said Gertrude Hendrie Grant, daughter of the Donor, then said Trustee shall pay over, deliver and convey all of the then remainder of said trust estate equally to the then living children of the said Gertrude Hendrie Grant and to the descendants of any deceased child of the said Gertrude Hendrie Grant, the descendants taking per stirpes and not per capita; That is, the descendants of any deceased child of the said Gertrude Hendrie Grant collectively and equally to take the share that their parent would have received if living. And in the event the said Gertrude Hendrie Grant dies leaving no child or children, nor descendants of any deceased child surviving her, then upon the death of the said Gertrude Hendrie Grant the said Trustee shall pay over, deliver and convey all of the then trust estate to the heirs at law of the said Gertrude Hendrie Grant under the then intestate laws of the State of Colorado.

[fol. 13] Third. No title in any part of the trust estate hereby created or in the income accruing therefrom or in its accumulations, shall vest in any beneficiary hereunder during the continuance of the trust as to such beneficiary, and no beneficiary shall have the right or power to transfer, assign, anticipate or encumber his or her interest in said trust estate or the income therefrom prior to the actual distribution thereof by the Trustee to such beneficiary.

Fourth. The Trustee may employ such agents and attorneys as it may deem reasonably necessary for the proper management and protection of the trust estate and pay reasonable compensation to such agent and attorneys, and the said Trustee shall receive as its fee for collection interest, income and profits hereunder, for investing and reinvesting funds and for accounting to the beneficiaries hereunder, two per cent (2%) of the gross income collected from all securities and properties belonging or to belong to said trust estate to be deducted as said income is received, and a distribution fee of one-quarter of one per cent (¼ of 1%) upon the corpus of said trust estate to be paid at the time of distribution, and in the event the Trustee sees fit to invest any part of said trust estate in real estate mortgages the Trustee in addition to the foregoing fees may charge the person borrowing and retain to itself the customary commission for making loans. In case of litigation or in case the Trustee performs services of an unusual and unexpected kind other than as aforesaid, its charges for such additional services shall be reasonable and just.

Fifth. The Trustee shall use its best judgment in the selection of securities for, and in the care of properties belonging to said trust estate, but it shall not be held for any loss by reason of any mistakes or errors of judgment made by it in good faith in the execution of said trust.

Sixth. The Trustee shall have the right to determine what portion of said trust estate constitutes income and what portion corpus for income tax purposes and for all purposes of this trust, and the decision of the Trustee in this regard as well as the valuations and judgment of the Trustee in making distribution of the principal of the trust estate, which may be made either in cash or in kind as the Trustee may decide, shall be binding and conclusive upon all persons who may at any time be or become beneficiaries hereunder.

[fol. 14] Seventh. That the securities and properties belonging or to belong to the said trust estate may for convenience in transferring, be held in the name of the Trustee or its nominee, it being understood, however, that on its books and records said securities and properties shall constantly be shown to be a part of said trust estate and all funds belonging thereto may be deposited through its Trust Department with said Trustee bank.

Eighth. This Trust is intended to be, and by the Donor is hereby declared to be irrevocable.

In Witness Whereof, said Donor has hereunto set his hand and said Trustee has caused this instrument to be executed in duplicate by its proper officers and its corporate seal to be hereunto affixed, on the day and year first above written.

Edwin B. Hendrie. (Seal.) The Colorado National Bank of Denver, by H. Kountze, Vice-President. (Seal.)

Attest: Frank N. Bancroft, Trust Officer.

STATE OF COLORADO,
City and County of Denver, ss:

I, (Clarence J. Rogers) a Notary Public in and for said City and County, in the State aforesaid, do hereby certify that Edwin B. Hendrie who is personally known to me to be the person whose name is subscribed to the foregoing Trust Agreement, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand notarial seal this 8th day of January A. D. 1927.

(Clarence J. Rogers), Notary Public. My commission expires April 26, 1927. (Seal.)

STATE OF COLORADO,
City and County of Denver, ss:

I, Stella Busbee, a Notary Public in and for said City and County of Denver, in the State aforesaid, do hereby certify, that H. Kountze and Frank N. Bancroft, Vice-President and [fol. 15] Trust Officer, respectively of The Colorado National Bank of Denver, who are personally known to me to be the persons whose names are subscribed to the foregoing Trust Agreement appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument of writing as the free and voluntary act and deed of The Colorado National Bank of Denver as Trustee therein, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 8th day of January A. D. 1927.

(Stella Busbee), Notary Public. My commission expires February 23, 1927. (Seal.)

I, Frank N. Bancroft, Trust Officer of The Colorado National Bank of Denver, hereby certify the foregoing instrument to be a true and correct copy of the Trust Agreement between Edwin B. Hendrie and The Colorado National Bank of Denver.

Subscribed and sworn to before me, a Notary Public this — day of February, 1932.

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EXHIBIT "C" TO PETITION

January 23, 1934.

MT-ET 1344-Colorado.
Estate of Edwin B. Hendrie.
Date of death July 15, 1932.

The Colorado National Bank of Denver, et al., Executor,
Denver, Colorado.

Sirs:

A deficiency in the Federal estate tax liability of the above-named estate is hereby proposed as the result of an examination of the return, Form 706, the revenue agent's report, and other data on file.

If you acquiesce in the proposed deficiency you are requested to execute and forward the enclosed Form 890, waiving the restrictions against the immediate assessment and collection of the deficiency. The submission of the waiver will expedite the closing of this case and will prevent the accumulation of interest charges, as the interest period terminates thirty days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file [fol. 16] a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

The issuance of this letter does not permit a petition to the United States Board of Tax Appeals, as the deficiency

is only tentatively determined. However, a protest against the proposed deficiency may be filed with the Commissioner of Internal Revenue within thirty days from the date of this letter. Every protest should be sworn to and filed in duplicate. If a hearing is desired, request therefor should be made at the time the protest is filed. Any additional evidence relied upon should accompany the protest.

If the tax cannot be finally determined on the basis of a waiver submitted or if a protest is not filed within the time allowed by this letter, a final determination of the tax will thereafter be made and you will be notified by registered mail of any deficiency in accordance with Section 308 (a) of the Revenue Act of 1926.

Examination of the return discloses the following:

| | Returned | | Tentatively Determined | |
|---|---|---|---|---|
| Gross estate | $2,000,000.68 | | $2,018,912.80 | |
| Deductions (1926 Act) | 161,887.60 | | 148,730.55 | |
| Net Estate (1926 Act) | $1,776,419.08 | | $1,870,182.25 | |
| Gross estate | $2,000,000.68 | | $2,018,912.80 | |
| Deductions (1932 Act) | 111,887.60 | | 98,730.55 | |
| Net estate (1932 Act) | $1,926,419.08 | | $1,920,182.25 | |
| 1. Gross tax (1926 Act) | $23,085.14 | | $121,816.40 | |
| 2. Credit for gift tax | 0.00 | | 0.00 | |
| 3. Gross tax less gift tax credit | $23,085.14 | | $121,816.40 | |
| 4. Credit for estate or inheritance tax | 20,468.11 | | 0.00 | |
| 5. Net tax (1926 Act) | | $6,617.03 | | $121,816.40 |
| 6. Total gross taxes (1926 and 1932 Acts) | $96,491.24 | | $309,238.27 | |
| 7. Gross tax (1926 Act) | 33,085.14 | | 121,816.40 | |
| 8. Gross additional tax | $63,406.10 | | $187,421.87 | |
| 9. Credit for gift tax | 0.00 | | 0.00 | |
| 10. Net additional tax | | 63,406.10 | | 187,421.87 |
| 11. Total net tax | | $70,023.13 | | $309,238.27 |
| [fol. 17] Amount assessed as deficiency pursuant to waiver | | 0.00 | | 70,023.13 |
| Deficiency | | | | $239,215.14 |

The deficiency bears interest at the rate of 6 per centum per annum from one year after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The deficiency results from the following adjustments:

Gross Estate

Stocks and Bonds

| | Returned | Tentatively Determined |
|---|---|---|
| Item 1 | $250.00 | $2,500.00 |
| Item 2 | 9,020.00 | 9,570.00 |
| Item 6 | 1,700.00 | 1,587.50 |
| Item 10 | 6,525.00 | 6,712.50 |
| Item 11 | 4,000.00 | 5,000.00 |
| Item 14 | 2,000.00 | 3,000.00 |
| Item 15 | 3,187.50 | 3,750.00 |
| Item 16 | 3,187.50 | 3,250.00 |
| Item 17 | 7,800.00 | 8,000.00 |
| Item 18 | 9,562.50 | 9,937.50 |
| Item 19 | 178,500.00 | 210,000.00 |
| Item 20 | 1,937.50 | 1,937.50 |
| Item 23 | 5,000.00 | 5,125.00 |
| Item 26 | 1,250.00 | 1,312.50 |
| Item 27 | 2,562.50 | 2,625.00 |
| Item 29 | 3,000.00 | 2,562.50 |
| Item 30 | 11,000.00 | 11,206.25 |
| Item 32 | 24,000.00 | 24,800.00 |
| Item 35 | 812.50 | 875.00 |
| Item 36 | 375.00 | 410.00 |
| Item 38 | 6,800.00 | 6,975.00 |
| Item 39 | 20,500.00 | 25,500.00 |
| Dividend on Item 39 | 0.00 | 750.00 |
| Item 42 | 6,300.00 | 5,850.00 |
| Item 43 | 5,062.50 | 5,187.50 |
| Item 45 | 4,000.00 | 4,500.00 |
| Item 50 | 750.00 | 625.00 |
| Item 51 | 18.75 | 20.00 |

[fol. 18]

| | | |
|---|---|---|
| Item 53 | 4,200.00 | 4,400.00 |
| Item 55 | 4,000.00 | 4,250.00 |
| Item 58 | 5,471.87 | 5,536.25 |
| Item 60 | 1,200.00 | 1,312.50 |
| Item 62 | 1.88 | 2.00 |
| Item 64 | 94.00 | 93.00 |
| Mortgages, Notes, Cash and Insurance | | |
| Item 5 | 1,700.00 | 3,408.50 |

Gross Estate—Continued

| Transfers | Returned | Tentatively Determined |
|---|---|---|
| The value of the following described property transferred by the decedent prior to death is included in the gross estate under the provisions of Section 302 (c) of the Revenue Act of 1926 as having been made to take effect at or after death. | | |
| Trust of January 7, 1927 | 0.00 | 1,034,074.22 |

Deductions

| | Tentatively Determined | Returned |
|---|---|---|
| Funeral expenses | $875.00 | $905.50 |
| Executors' commissions | 30,000.00 | 27,500.00 |
| Attorneys' fees | 10,000.00 | 25,000.00 |
| Miscellaneous administration expenses | 400.00 | 200.00 |
| Debts of decedent | 5,356.55 | 5,883.10 |
| To balance | 1,093,763.17 | |

"Funeral expenses" are deducted in the amount paid.

"Executors' commissions" and "Attorneys' fees" are deducted in the amounts which have been or will be paid.

"Miscellaneous administration expenses" are deducted in the amount which appears to be correct.

Item 7 under "Debts of decedent" is deducted in the amount of $2,559.55, which is the total amount of personal taxes paid during the years 1931 and 1932.

Credit

No credit is allowed for State estate, inheritance, legacy, or succession taxes, as the evidence required by Article 9 of [fol. 19] Regulations 70 (1929 edition) has not been submitted. Please advise when the credit evidence may be expected.

If the full 80% credit is allowed, the net deficiency will be $141,762.02. Execution of the enclosed waiver as to that amount will enable the Bureau to assess the full amount of the probable net tax and expedite the closing of the case.

Respectfully, (Signed) Adelbert Christy, Acting Deputy Commissioner.

GCW:mab.

Encl.—Waiver.

EXHIBIT "D" TO PETITION

Part I

Assets of Trust Under Agreement with E. B. Hendrie as of July 15, 1932

| Par Value | Asset | Market | Principal | Accrued Income | Total |
|---|---|---|---|---|---|
| (1) | Clark County, Idaho, Highway Dist. 5½% Bonds, due 1/1/48 Interest pble. Jan. & July 1 | 65 | $32,500.00 | $111.81 | $32,611.81 |
| (2) 50,000. | Federal Land Bank of New Orleans 4½% Bonds, opt. 1933, due 1953 interest pble. Jan. & July 1 | 88¼ | 44,125.00 | 92.36 | 44,217.36 |
| (3) 50,000. | Federal Land Bank of Springfield 4½% bonds, opt. 1934, due 1954 Interest pble. Jan. & July 1 | 88¼ | 44,125.00 | 92.36 | 44,217.36 |
| (4) 40,000. | Imperial Irrigation District Issue No. 4 6% Bonds, due serially 7/1/41 to 7/1/55; Interest pble. Jan. & July 1 | 24 | 11,760.00 | default | 11,760.00 |
| (5) 10,000. | Kansas City Terminal Company 4% First Mtge. Bonds, due 1/1/60 Interest pble. Jan. & July 1 | 82½ | 8,250.00 | 15.56 | 8,265.56 |
| [fol. 20] | | | | | |
| (6) 34,000. | Morgan County, Colorado S. D. No. 3 4½% Bonds, due serially 1/1/52 to 1/1/57; Interest pble. Jan. & July 1 | 99 | 33,660.00 | 56.19 | 33,716.19 |
| (7) 102,000. | Farmers Irrigation District of Scottsbluff County, Nebraska 6% Ref. Bonds, due serially 1/1/53 to 1/1/71; Interest pble. Jan. & July 1 | 25 | 25,500.00 | 288.00 | 25,788.00 |
| (8) 50,000. | Maricopa County, Arizona, Glendale Union High School 4½% Bonds, due serially 7/15/39 . . . 48 Interest pble. Jan. & July 15 | 80 | 40,000.00 | 0. | 40,000.00 |
| (9) 61,000. | Maricopa County, Arizona Tolleson Union High School 4½% Bonds, due serially 7/15/40 . . . 47 Interest pble. Jan. & July 15 | 75 | 45,750.00 | 0. | 45,750.00 |

Exhibit "D" to Petition—Part I—Assets of Trust Under Agreement with E. B. Hendrie as of July 15, 1932—Continued

| Par Value | Asset | Market | Principal | Accrued Income | Total |
|---|---|---|---|---|---|
| (10) 25,000. | Republic of Chile, External S. F. 6% Bonds, due 2/1/61 Interest pble. Feb. & Aug. 1 | 7¾ | 1,937.50 | default | 1,937.50 |
| (11) 50,000. | Denver & Rio Grande Western R. R. Co. Gen. Mtge. S. F. 5% Bonds, due 8/1/55; Interest payable Feb. & Aug. 1 | 6½ | 3,250.00 | 1,138.89 | 4,388.89 |
| (12) 25,000. | Marlin, Texas, Sewerage Disposal Plant 5% Bonds, opt. 2/1/38, due 2/1/58; Interest payable Feb. & Aug. 1 | 80 | 20,000.00 | 569.45 | 20,569.45 |
| (13) 50,000. | Middle Rio Grande Conservancy Dist. 5½% Bonds, due 8/1/60 . . . 70 Interest pble. Feb. & Aug. 1 | 70 | 35,000.00 | 1,252.78 | 36,252.78 |
| (14) 25,000. | Cameron County, Texas, Road Series D 5% Bonds, due 2/15/48 Interest pble. Feb. & Aug. 15 | 33 | 8,250.00 | 520.85 | 8,770.85 |
| Fol. 21] | | | | | |
| (15) 50,000. | Joint Stock Land Bank of Cleveland 5% bonds, opt. 1934, due 3/1/54; Interest pble. March and Sept. 1 | 40 | 20,000.00 | 930.56 | 20,930.56 |
| (16) 50,000. | Missouri Gas & Electric Service Co. First Mtge. Ref. Series A, 6% Bonds, due 9/1/44; Interest pble. March and Sept. 1 | 46 | 23,000.00 | 1,116.77 | 24,116.77 |
| (17) 24,250. | Pettibone Mulliken Company First Mtge. S. F. 6% Bonds, due 9/1/43; Int. pble. Mar. & Sept. 1 | 5 | 1,212.50 | default | 1,212.50 |
| (18) 50,000. | Union Pacific R. R. Company First Lien Ref. 5% Bonds, due 6/1/2008; Interest pble. March and Sept. 1 | 90 | 45,000.00 | 930.56 | 45,930.56 |
| (19) 50,000. | Chicago, Milwaukee & Gary Ry. Co. First Mtge. 5% Bonds, due 4/1/48; Interest pble. April & Oct. 1 | 40 | 20,000.00 | 722.22 | 20,722.22 |

Exhibit "D" to Petition—Part 1—Assets of Trust Under Agreement with E. I. Hendrie as of July 15, 1939—Continued

| Par Value | Asset | Market | Principal | Accrued Income | Total |
|---|---|---|---|---|---|
| (20) 46,000. | Fremont County, Colorado S. D. No. 1 4¼% Bonds, opt. 1939, due 4/1/54; Interest pble. April & Oct. 1 | 100 | 46,000.00 | 631.22 | 46,631.22 |
| (21) 10,000. | New Mexico State Highway Debenture Series G35 6% Bonds, due 4/1/40 Interest pble. April & Oct. 1 | 95 | 9,500.00 | 173.23 | 9,673.23 |
| (22) 25,000. | New Orleans, Texas & Mexico Ry. Co. First Mtge. Series B 5% Bonds due 4/1/54; Interest pble. April & Oct. 1 | 23½ | 5,875.00 | 361.11 | 6,236.11 |
| (23) 50,000 | New York Dock Company 5% Serial Bonds, due 4/1/38; Interest pble. Apr. & Oct. 1 | 38 | 19,000.00 | 722.22 | 19,722.22 |
| [fol. 22] | | | | | |
| (24) 25,000 | Southern Pacific-Golden Gate Ferries First Mtge. S. F. 5½% Bonds, due 4/1/49; Interest pble. April & Oct. 1 | 62 | 15,500.00 | 367.22 | 15,867.22 |
| (25) 30,500. | Waco Custer Ditch Company, First Mtge. 6% Bonds, due serially 10/1/35 . . . 50; Interest pble. April & Oct. 1 | 50 | 15,250.00 | 528.67 | 15,778.67 |
| (26) 50,000 | Wisconsin Central Ry. Co. First and Ref. Mtge. 4% Bonds, due 4/1/59; Interest pble. April & Oct. 1 | 81½ | 40,750.00 | 577.78 | 41,327.78 |
| (27) 25,000. | Mortgage Bank of Chile, Guaranteed S. F. 6% Bonds, due 4/30/61; Int. pble. April 30 & Oct. 31 | 8 | 2,000.00 | default | 2,000.00 |
| (28) 50,000 | First Trust Joint Stock Stock Land Bank of Chicago 4¼% Bonds, due 5/1/54; opt. 1934; Interest payable May and Nov. 1 | 53 | 26,500.00 | 488.19 | 26,988.19 |
| (29) 50,000 | Bijou Irrigation District Ref. series 26, 27 & 28, 6% Bonds, due | 50 | 25,000.00 | default | 25,000.00 |

Exhibit "D" to Petition—Part I—Assets of Trust Under Agreement with E. B. Hendrie as of July 15, 1932—Continued

| Par Value | Asset | Market | Principal | Accrued Income | Total |
|---|---|---|---|---|---|
| | serially 12/1/48 . . . 50 interest pble. June & Dec. 1 | | | | |
| (30) 25,000 | Colorado State Highway 5% Bonds opt. 1932, due 6/1/52; Interest pble. June & Dec. 1 | 100 | 25,000.00 | 152.78 | 25,152.78 |
| (31) 25,000 | Holbrook Irrigation District Refunding 6% Bonds, due 12/1/43; Interest pble. June & Dec. 1 | 35 | 24,500.00 | default | 24,500.00 |
| (32) 15,000. | Kansas City, Kansas, General Improvement Series P, 4½% Bonds due 6/1/42; Interest payable June and Dec. 1 | 98 | 14,700.00 | 82.50 | 14,782.50 |
| Sol. 23] | | | | | |
| (33) 10,000. | Salt Lake County, Utah, Tax 5% Bonds, due 12/31/32 Interest payable Dec. 31 | 100⅛ | 10,012.50 | 267.04 | 10,279.54 |
| (34) 10,000. | General Electric Co. of Germany S. F. Debenture 6% Bonds, due 5/1/48; Interest payable May and November 1 | 32¾ | 3,287.50 | 123.33 | 3,410.83 |
| (35) 10,000. | Pacific Gas & Electric Co. Series A. Gen. & Ref. Mtge. 5% Bonds, due 1/1/42 | 100⅛ | 10,012.50 | 19.44 | 10,031.94 |
| (36) 50,000. | German Government International Loan 5½% Bonds, due 6/1/65; Interest pble. June & Dec. 1 | 44¾ | 22,375.00 | 336.11 | 22,711.11 |
| (37) 10,000. | Westphalia United Electric Power Company First Mtge S. F. Series A 6% Bonds, due 1/1/53; Interest pble. Jan. & July 1 | 22¾ | 2,262.50 | 23.33 | 2,285.83 |
| (38) 1,000 shares | Brooklyn Manhattan Transit Corp. Preferred $6.00 Series A. Stock | 48⅝ | 48,625.00 | | 48,625.00 |
| (39) 500 shares | Neptune Meter Company, preferred 8% Stock, $100 par value | 40 | 20,000.00 | | 20,000.00 |

Exhibit "D" to Petition—Part I—Assets of Trust Under Agreement with R. I. Hendrie as of July 15, 1932—Continued

| Par Value | Asset | Market | Principal | Accrued Income | Total |
|---|---|---|---|---|---|
| (40) 500 shares | Niagara Hudson Power Company Common Stock, $15.00 par value | 8⅜ | 4,187.50 | | 4,187.50 |
| (41) 500 shares | Pennroad Corporation, Capital Stock, no par value | 1⅜ | 687.50 | | 687.50 |
| (42) 1,000 shares | Chicago, Milwaukee, St. Paul & Pacific R. R. Co., Preferred Stock $100 par value | 1½ | 1,500.00 | | 1,500.00 |
| (43) 500 shares | Erie Railroad Company, Common Stock, $100 par value stock | 3½ | 1,750.00 | | 1,750.00 |
| (44) 500 shares | Erie Railroad Company, First Preferred, $100 par value stock | 4 | 2,000.00 | | 2,000.00 |
| [fol. 24] | | | | | |
| (45) 1,500 shares | Pennsylvania Railroad Company Capital Stock, $50 par value | 8 | 12,000.00 | | 12,000.00 |
| (46) 1,000 shares | Homestake Mining Company, Capital Capital Stock, $100 par value | 122⅜ | 122,875.00 | | 122,375.00 |
| (47) $17,000 | McFarlane Eggers Realty Co. 6½% note, due 10/18/38; Interest pble. April & Oct. 18 | 100 | 17,000.00 | $346.50 | 17,346.50 |
| (48) | Pettibone Mulliken Company Common Stock Purchase Warrants | | | | |
| (49) | Russian Bonds Cash | | 21,590.82 | | 21,590.82 |
| Totals | | | $1,032,560.82 | $12,919.00 | $1,045,479.82 |

## Part II.

### Differences between Colorado National Bank List of Assets and that recommended by the Government Examiner in letter of December 15, 1933.

Note: Increase denotes C. N. B. list exceeds government list; Decrease denotes C. N. B. list is less than government list.

| Item | Principal | | Accrued Interest | |
|---|---|---|---|---|
| | Increase | Decrease | Increase | Decrease |
| (1) | ..... | ..... | ..... | $7.98 |
| (2) | ..... | ..... | ..... | 6.60 |
| (3) | ..... | ..... | ..... | 6.60 |
| (4) | ..... | ..... | ..... | 122.50 |
| (5) | ..... | ..... | ..... | 9.44 |
| (6) | ..... | ..... | ..... | 4.02 |
| (7) | ..... | ..... | ..... | 17.00 |
| (8) | ..... | ..... | ..... | 1,187.50 |
| (9) | ..... | ..... | ..... | 1,448.75 |
| (10) | ..... | ..... | ..... | 687.50 |
| (11) | ..... | ..... | ..... | 6.93 |
| (12) | ..... | ..... | ..... | 3.58 |
| (13) | ..... | ..... | $92.35 | ..... |
| (15) | ..... | ..... | ..... | 6.93 |
| [fol. 25] | | | | |
| (16) | ..... | ..... | ..... | 8.23 |
| (17) | ..... | ..... | ..... | 551.25 |
| (18) | ..... | ..... | ..... | 6.93 |
| (19) | ..... | ..... | ..... | 6.94 |
| (20) | ..... | ..... | ..... | 6.06 |
| (21) | ..... | ..... | ..... | 1.77 |
| (22) | ..... | ..... | ..... | 3.48 |
| (23) | ..... | ..... | ..... | 6.94 |
| (24) | ..... | ..... | ..... | 3.81 |
| (25) | ..... | ..... | ..... | 5.08 |
| (26) | ..... | ..... | ..... | 5.56 |
| (27) | ..... | ..... | ..... | 437.50 |
| (28) | $17,000.00 | ..... | ..... | 6.38 |
| (29) | ..... | ..... | ..... | 375.00 |
| (30) | ..... | ..... | ..... | 3.47 |
| (31) | ..... | ..... | ..... | 525.00 |
| (32) | ..... | ..... | ..... | 1.87 |
| (33) | ..... | ..... | ..... | 3.75 |
| (34) | ..... | ..... | ..... | 1.67 |
| (35) | ..... | ..... | ..... | 1.39 |
| (36) | ..... | ..... | ..... | 7.64 |
| (37) | ..... | ..... | ..... | 1.67 |
| | $17,000.00 | ..... | $92.35 | $5,486.72 |
| | ..... | | | —92.35 |
| Net | $17,000.00 | | | $5,394.37 |
| | —5,394.37 | | | |
| Total Increase | $11,405.63 | | | |

## Explanation of Above Differences

Item No. 28—In the list which was formerly given the government by the bank, this security was listed as Chicago Joint Stock Land Bank and was quoted at 19. These bonds were thus incorrectly described as they should have been obligations of the First Trust Joint Stock Land Bank of Chicago. Quotation for these bonds was given to us by Boettcher Newton and Company to be 51 bid—55 ask. On this basis we have used a market value of 53.

[fol. 26] Item No. 4—The Government list figured accrued interest on these bonds. Since the July 1, 1932 coupon was not paid, the quotation was at a flat price and no accrued interest should have been computed.

Item No. 8 & Item No. 9—The interest upon these two issues was due and paid July 15, 1932. The cash received from these coupons is included in the total cash amounting to $21,590.82. Therefore the accrued interest should not be included in these two issues.

Item No. 10—These bonds of the Republic of Chile went into default August 1, 1931 and so are quoted at the flat price. Accrued interest should not be included.

Item No. 13—Our computation of accrued interest and that of the government do not agree. We believe that their figure is given in error.

Item No. 17—These bonds of Pettibone Mulliken Company went into default September 1, 1931 and so are quoted at the flat price. Accrued interest should not be included.

Item No. 27—These bonds of the Mortgage Bank of Chile went into default October 1, 1931 and so are quoted at the flat price. Accrued interest should not be included.

Item No. 29—These bonds of Bijou Irrigation District went into default June 1, 1932 and so are quoted at the flat price. Accrued interest should not be included.

Item No. 31—These bonds of Holbrook Irrigation District went into default June 1, 1932 and so are quoted at the flat price. Accrued interest should not be included.

The small differences remaining in accrued interest on the two lists are accounted for by the fact that the govern-

ment figured one more day's interest on all the items than the bank did. For example, on the first item, $50,000.00 Clark County, Idaho bonds upon which interest was paid to July 1, 1932, they computed fifteen days accrued interest. This is contrary to the usual custom of figuring fourteen days interest from July 1st to July 15th. We believe the government is in error on all these small differences.

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[fol. 27] BEFORE UNITED STATES BOARD OF TAX APPEALS
ANSWER—Filed January 30, 1935

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, in answer to the petition of the above-named taxpayers, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits so much of paragraph 3 of the petition as alleges that the taxes in controversy are estate taxes for the Estate of Edwin B. Hendrie, and denies all other allegations contained in said paragraph.

4. Denies that the respondent, in determining the deficiency tax, committed errors as alleged in paragraph 4 of the petition.

5. Admits the allegations contained in the first subdivision of paragraph 5 of the petition, beginning "Generally."

(a) Denies the allegations contained in (a) of paragraph 6 of the petition.

(b) Admits so much of subdivision (b) of paragraph 5 of the petition as alleges that the respondent, in the notice of deficiency, (Exhibit A, petition), asserts he sustains the tentative finding that the properties which were transferred by the decedent by the trust agreement of January 7, 1927 (Exhibit B, petition), should be included in the gross estate as a transfer under the provisions of Section 302 (c) of the Revenue Act of 1926; that a true copy of the respondent's tentative finding, being a letter addressed to the petitioners on January 23, 1934, is annexed to the petition and marked Exhibit C, and made a part thereof; that in such tentative

finding the respondent included the value of the properties transferred by the aforesaid trust agreement in the gross estate as being a transfer made to take effect at or after death; that in the statutory notice of deficiency (Exhibit A) the respondent has included the value of the properties of such trust in the decedent's gross estate for the additional reason that such transfer was made in contemplation of death; that the decedent executed said trust indenture of January 7, 1927, during his lifetime, when he was eighty years of age; and denies all other allegations contained in [fol. 28] said subdivision (b) of paragraph 5 of the petition.

(c) and (d) Denies the allegations contained in subdivisions (c) and (d) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore it is prayed that the determination of the Commissioner be approved.

(Signed) Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue. Of counsel: Frank T. Horner, Special Attorney, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

MEMORANDUM OPINION

MURDOCK: The Commissioner determined a deficiency in estate tax of $188,108.28. The only issue left for decision by the Board is raised by the petitioners' assignment that the Commissioner erred in including in the decedent's gross estate properties which he had placed in trust on January 7, 1927. The facts have been stipulated. The Commissioner determined that the property placed in trust was properly a part of the gross estate of the decedent under section 302(c) of the Revenue Act of 1926 because the transfer to the trust was made in contemplation of the death of the donor and was made to take effect in possession or enjoyment at or after his death. Counsel for the respondent argues in his brief only that the transfer was made in contemplation of death.

The decedent, Edwin B. Hendrie, died on July 15, 1932 at the age of 85 years and six months. He established a trust on January 7, 1927 when he was 80 years of age. He was then in good health. The trust was irrevocable. The trust instrument provided that the income of the trust should be accumulated during the lifetime of the donor and added to the corpus, "after the death of the Donor the net income from all of the trust estate, or so much thereof as Gertrude Hendrie Grant, daughter of the Donor may call for, shall be paid to her by the Trustee so long as she shall live" while that not called for should be added to the [fol. 29] corpus, and the corpus was to go to the children of Gertrude Hendrie Grant at her death. The trust contained a provision against anticipation by any beneficiary.

The decedent discussed with the trust officer of a bank, in the latter part of 1926, the purposes and details of the trust which he proposed to establish. He said he wanted to transfer about one-third of his assets in the interest of his daughter and her heirs so that whatever might happen to his own financial affairs in the future, those persons would be provided for. He said he desired to retain for himself his more speculative securities and to feel free to speculate with that property during the rest of his life, but to put the other one-third beyond his own reach and risk. He said he desired and intended to "play on the market" to a greater extent and in a more speculative way for the remainder of his life. The only evidence that the daughter or her husband ever knew of the trust is a statement which the decedent made in 1930 to the husband that his (Hendrie's) daughter and grandchildren would be adequately provided for, in the event of his death, through the medium of a trust which he had created and which would not be affected by his operations on the stock market. It does not appear that the daughter knew the details of the trust prior to her father's death.

The decedent's will was dated January 26, 1925. It provided that the bulk of his estate should be placed in trust for the benefit of his daughter and her children with remainders to the children.

The petitioners have the burden of proof to show that the transfer was not made in contemplation of death within the meaning of section 302(c). They recognize that the determination of the Commissioner is presumed to be correct and argue that the evidence shows affirmatively that

the dominant motive in the mind of the donor was connected with life, not with the thought of death. Their point is that he made the transfer so that he would be free to speculate on the stock market for the rest of his life without fear that loss of his fortune would leave nothing for his daughter and her children. They point out that the donor made a complete gift and retained no possession or enjoyment to himself. They cite and rely upon Shukert v. Allen, 273 U. S. 545; McCormick v. Burnet, 283 U. S. 784; St. Louis Union Trust Co. v. Becker, 76 Fed. (2d) 851, affirmed 296 U. S. 48; Reinecke v. Northern Trust Co., 278 U. S. 339; [fol. 30] Klein v. United States, 283 U. S. 231, among others. The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death. We think the transfer was not made in contemplation of death within the meaning of the statute as explained in United States v. Wells, 283 U. S. 102. Principles announced in the cases above listed control this case which is not distinguishable from one or more of those cases where, as here, income was to be accumulated until after the death of the donor. Therefore, on this point we hold for the petitioners.

Decision will be entered under Rule 50.

Entered Sept. 19, 1936.

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Before United States Board of Tax Appeals

Decision

Pursuant to the Board's Memorandum Opinion entered September 19, 1936, the respondent, on October 13, 1936, filed a proposed recomputation and notice of settlement. On October 24, 1936, the petitioner filed a notice of acquiescence to the recomputation filed by the respondent. Therefore, it is,

Ordered and Decided, that there is a deficiency in estate tax in the amount of $5,283.19.

(Signed) J. E. Murdock, Member, United States Board of Tax Appeals.

Entered Nov. 9, 1936.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed January 30, 1937

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, Herman Oliphant, General Counsel for the Department of the Treasury, and John M. Morawski, [fol. 31] Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

The petitioner on review (hereinafter referred to as the Commissioner) is the duly authorized, qualified and acting Commissioner of Internal Revenue of the United States. The respondents on review (hereinafter referred to as the taxpayers) are executors of the Estate of Edwin B. Hendrie, deceased. The principal place of business of The Colorado National Bank of Denver, and the residence of Gertrude Hendrie Grant, are Denver, Colorado. Taxpayers filed an estate tax return with the Collector of Internal Revenue for the District of Colorado, whose office is located in Denver, Colorado. The office of said Collector of Internal Revenue is located within the judicial district of the United States Circuit Court of Appeals for the Tenth Circuit.

II

The Commissioner determined a deficiency in the estate tax of the taxpayers in the amount of $188,108.28, and on September 13, 1934, pursuant to the provisions of the Revenue Acts, sent to the taxpayers by registered mail a notice of said deficiency. Thereafter, the taxpayers filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals.

The case was submitted to the Board on the pleadings and a stipulation of facts including certain exhibits. On September 19, 1936, the Board entered its memorandum opinion in said appeal.

On November 9, 1936, the Board entered its decision and final order of redetermination in said appeal wherein and whereby the Board ordered and decided that there was a deficiency in estate tax in the amount of only $5,283.19.

III

The decedent died in 1932 at the age of 85 years and 6 months. On January 7, 1927, at the age of 80 the decedent, apparently in good health, executed a trust instrument which was irrevocable and which provided for the accumulation of income and treating it as a part of the corpus during the lifetime of the donor, and after the death of the donor the [fol. 32] net income, or as much of it as she might care for, was to be paid to the decedent's daughter during her lifetime and upon her death the principal was to be divided equally among her children, the descendants of the dead child taking the parent's share, and in case she left no issue, then to her heirs. No title was to vest in the beneficiary until actual distribution. The trust created on January 7, 1927, was substantially in form and effect somewhat similar to provisions in the will made by the decedent in 1925.

After the death of the decedent the executors filed an estate tax return in which the value of the trust created January 7, 1927, was not included as a part of the decedent's gross estate. The Commissioner in his notice of deficiency mailed September 13, 1934, determined that the value of said trust should have been included in the decedent's gross estate on the ground that the transfer was made in contemplation of or intended to take effect in possession or enjoyment at or after his death within the meaning of Section 302 (c) of the Revenue Act of 1926, 44 Stat. 9, 70, ch. 27 (U. S. C. Title 26, Sec. 411).

It is the position of the Commissioner that the dominant purpose of making the transfer was one associated with death rather than with life, and that the transfer was therefore made in contemplation of death within the purview of the statute. The Board, however, held that the transfer was not made in contemplation of death within the meaning of the statute.

IV

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals, manifest errors occurred and intervened to the prejudice of the Commissioner, and the Commissioner assigns the following errors and each one of

them he avers occurred in the record proceedings, decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to-wit:

1. The Board erred in holding and deciding that there is a deficiency in estate tax of only $5,283.19.

2. The Board erred in failing to hold and decide that there is a deficiency in estate tax in the amount of $184,958.28.

[fol. 33] 3. The Board erred in holding and deciding that the transfer effected by declaration of trust dated January 7, 1927, was not made in contemplation of or intended to take effect in possession or enjoyment at or after decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926.

4. The Board erred in failing to hold and decide that the transfer effected by declaration of trust dated January 7, 1927, was made in contemplation of or intended to take effect in possession or enjoyment at or after decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926.

5. The Board erred in that its findings of fact are not supported by the evidence.

6. The Board erred in that its decision is not supported by the evidence and is contrary to law.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Tenth Circuit and that a transcript of the record be prepared in accordance with the law and the rules of said Court and transmitted to the clerk of said Court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) James W. Morris, Assistant Attorney General. (Signed) Herman Oliphant, General Counsel for the Department of the Treasury. Of Counsel: Dewitt M. Evans, John M. Morawski, Special Attorneys Bureau of Internal Revenue.

*Duly sworn to by John M. Morawski. Jurat omitted in printing.*

[fol. 34] In United States Circuit Court of Appeals

Notice of Filing Petition for Review—Filed February 5, 1937

To The Colorado National Bank of Denver, Champa and Seventeenth Streets, Denver, Colorado.

Mrs. Gertrude Hendrie Grant, 7020 East Twelfth Avenue, Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 30th day of January, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 30th day of January, 1937.

(Sgd.) Herman Oliphant, General Counsel for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 2nd day of February, 1937.

The Colorado National Bank of Denver, Co-Executor, (Sgd.) by Charles A. Baer, Estate Division. (Sgd.) Gertrude Hendrie Grant, by W. W. Grant, Attorney-in-fact, Respondents on Review.

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[fol. 35] In United States Circuit Court of Appeals

Notice of Filing Petition for Review—Filed February 5, 1937

To Erl H. Ellis, 730 Equitable Building, Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 30th day of January, 1937, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit, of the deci-

sion of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 30th day of January, 1937.

(Sgd.) Herman Oliphant, General Counsel for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 2nd day of February, 1937.

(Sgd.) Erl H. Ellis, Attorney for Respondents on Review.

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BEFORE UNITED STATES BOARD OF TAX APPEALS

STIPULATION OF FACTS—Filed May 19, 1936

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts shall be taken and deemed to be true and may be taken and accepted by the United States Board of Tax Appeals as proved by the evidence herein contained, provided, however, that nothing herein contained shall be so construed as to limit the right of either of the parties to offer further and additional testimony not at variance with the facts herein stipulated at any hearing of the above entitled appeal, if, and in the event this Board should deny the petitioner's motion to submit this appeal to the Board for decision on the basis of the within agreed to facts and without a formal hearing:

1. Edwin B. Hendrie, a resident of Denver, Colorado, died on July 15, 1932. He was born January 10, 1847.

[fol. 36] 2. Gertrude Hendrie Grant is now and has been continuously since August 8, 1932, a duly qualified and acting executor of the Estate of Edwin B. Hendrie, deceased.

3. The Colorado National Bank of Denver, Denver, Colorado, is now and has been continuously since August 8, 1932, a duly appointed, qualified and acting executor of the Estate of Edwin B. Hendrie, deceased.

4. Gertrude Hendrie Grant and The Colorado National Bank of Denver are now and at all times have been the only duly appointed, qualified and acting executors of the Estate of Edwin B. Hendrie, deceased.

5. The executors of the Estate of Edwin B. Hendrie, deceased, on June 2, 1933, filed a Federal estate tax return with the Collector of Internal Revenue at Denver, Colorado, reporting thereing a gross estate of $938,006.68, deductions computed under the Revenue Act of 1926 of $161,587.60, deductions under the Revenue Act of 1932 of $111,587.60, a gross tax liability under the Revenue Act of 1926 of $33,085.14 against which was claimed a credit for State estate, inheritance, legacy or succession taxes of 80 per cent thereof, or $26,468.11, a net tax liability under the Revenue Act of 1926 of $6,617.03, a net tax liability under the Revenue Act of 1932 of $63,406.10, and a total net tax liability of $70,023.13.

6. The total net tax liability of $70,023.13 reported in the Federal estate tax return filed by the executors of the Estate of Edwin B. Hendrie, deceased, was paid to the Collector of Internal Revenue at Denver, Colorado, in two installments on July 15, 1933, and on December 4, 1933.

7. The Commissioner of Internal Revenue on September 13, 1934 mailed a notice of deficiency in estate tax against the Estate of Edwin B. Hendrie, deceased, to the executors of that estate. A true and and correct copy of that notice of deficiency is hereto annexed and marked Exhibit A. A true and correct copy of the tentative finding of the Commissioner of Internal Revenue referred to in the notice of deficiency is annexed hereto and marked Exhibit B.

8. In the Commissioner's notice of deficiency of estate tax against the Estate of Edwin B. Hendrie mailed on September 13, 1934, a deficiency of $188,108.28 was claimed after allowing a credit for State inheritance, estate, legacy or [fol. 37] succession taxes paid of $51,106.86 against the Federal estate tax liability determined by him under the provisions of the Revenue Act of 1926.

9(a). In determining the value of the gross estate of Edwin B. Hendrie, deceased, the Commissioner of Internal Revenue in the notice of deficiency mailed on September 13, 1934, included therein an amount of $1,034,074.22, repre-

senting the value at the date of Edwin B. Hendrie's death of certain properties transferred in trust by Edwin B. Hendrie on January 7, 1927, which such transfer in trust is more specifically described in the next succeeding paragraph.

9(b). On January 7, 1927, the decedent, Edwin B. Hendrie, made and executed an instrument in writing wherein and whereby he transferred to The Colorado National Bank of Denver, as Trustee, certain securities in trust subject to the provisions therein contained. A full, true and correct copy of the said instrument is hereto annexed and marked Exhibit C.

9(c). The Colorado National Bank of Denver accepted the trust as trustee on January 7, 1927, and has continuously from then to the present date acted as such trustee and pursuant to the terms of the trust instrument dated January 7, 1927.

9(d). The petitioners in reporting the gross estate in the Federal estate tax return filed as set out in the within paragraph numbered five did not include therein any of the properties included in the trust mentioned in the preceding paragraphs of this stipulation.

10. It is hereby stipulated and agreed by and between the parties hereto that if Doctor J. E. Kinney, 606 Metropolitan Building, Denver, Colorado, were called to testify as a witness in a formal hearing of this appeal before the United States Board of Tax Appeals he would give the identical testimony set forth in Exhibit D hereunto annexed, and it is further stipulated and agreed that such testimony may be received by this Board and shall be given the same force and effect as if Doctor Kinney were present at such a hearing and after having been first duly sworn then and there gave such testimony.

11. It is hereby stipulated and agreed by and between the parties hereto that if Mr. Frank N. Bancroft, University Building, Denver, Colorado, were called to testify as a witness in a formal hearing of this appeal before the United [fol. 38] States Board of Tax Appeals he would give the identical testimony set forth in Exhibit E hereunto annexed, and it is further stipulated and agreed that such testimony may be received by this Board and shall be given

the same force and effect as if Mr. Frank Bancroft were present at such a hearing and after having first been duly sworn then and there gave such testimony.

12. It is hereby stipulated and agreed by and between the parties hereto that if Mr. W. W. Grant, 730 Equitable Building, Denver, Colorado, were called to testify as a witness in a formal hearing of this appeal before the United States Board of Tax Appeals he would give the identical testimony set forth in Exhibit F hereunto annexed, and it is further stipulated and agreed that such testimony may be received by this Board and shall be given the same force and effect as if Mr. W. W. Grant were present at such a hearing and after having been first duly sworn then and there gave such testimony.

13. It is hereby stipulated and agreed that the petitioners are entitled to a deduction in the amount of $15,000.00, representing attorney's fees, in addition to the amount of $10,000.00 allowed by the respondent as a deduction for attorneys' fees in the administration of the decedent's estate in the respondent's notice of deficiency.

14. It is hereby stipulated and agreed that the attached Exhibit G is a true and correct copy of the last will and testament of Edwin B. Hendrie, deceased, which said last will and testament has been duly admitted to probate by the County Court, City and County of Denver, Colorado, having jurisdiction in the premises.

It is hereby stipulated and agreed that the hereunto attached exhibits A to G, both inclusive, and hereinabove referred to are by this reference incorporated herein, made a part hereof, and shall be considered as introduced in evidence herein.

C. Clifton Owens, Counsel for Petitioners. (Signed) Herman Oliphant, General Counsel for the Dept. of the Treasurer, Counsel for Respondent.

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[fol. 39] [Exhibit A, notice of deficiency dated Sept. 13, 1934, is the same as Exhibit A to the petition, for which reason it is omitted from the printed record. See side folio 8.]

[Exhibit B, tentative findings of the commissioner, dated Jan. 23, 1934, is the same as Exhibit C to the complaint, for which reason it is omitted from the printed record. See side folio 15.]

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[Exhibit C, Memorandum of Agreement, is the same as Exhibit B to the complaint, for which reason it is omitted from the printed record. See side folio 10.]

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EXHIBIT "D" TO STIPULATION OF FACTS

Affidavit of Dr. J. E. Kinney

I hereby state that I am the J. E. Kinney, physician, Denver, Colorado, named in the stipulation in the above entitled matter relative to my testimony and that I have read said stipulation, and that the matters set forth and the statements made in paragraph 2 of said stipulation constitute a correct recital of my knowledge and recollection of the matters therein referred to, involving my professional activities with reference to Edwin B. Hendrie, and that if I were placed on the stand I would testify as true, in substance, those matters set forth in said paragraph 2.

J. E. Kinney.

Subscribed and sworn to before me this 4th day of October, 1935. Dorothy D. Edwards, Notary Public. My commission expires April 16, 1936. (Seal.)

Stipulation

Whereas, this matter involves, among other things, the question of whether or not Edwin B. Hendrie executed a trust agreement on January 7, 1927, in contemplation of death or in contemplation of his continued life: and,

Whereas, the petitioners have made application for an order to take the deposition of Dr. J. E. Kinney, 606 Metropolitan Building, Denver, Colorado; and,

[fol. 40] Whereas, it seems expedient to the parties to stipulate concerning the testimony of the said Dr. J. E. Kinney so that the same may be available to the Petitioners if by any chance said witness is not available at the time

of any hearing in this matter before the United States Board of Tax appeals;

Now, Therefore, it is stipulated and agreed between the parties hereto as follows:

1. That said Dr. J. E. Kinney would testify, if now examined, pursuant to commission or stipulation, generally as set forth in paragraph 2 hereof, and that to avoid the taking of his deposition, it is understood between the parties that the result of taking his deposition would be the producing of the evidence set forth in paragraph 2 hereof, and that such paragraph 2 may be introduced as evidence by either party hereto at the time of any hearing or trial of this matter before the United States Board of Tax Appeals with the same force and effect as though said Dr. J. E. Kinney had appeared in person before said Board and so testified, and with the same force and effect as though his deposition were now taken and such testimony set forth in said deposition and said deposition were introduced at said hearing or trial; Provided, however, that if at the time of any such hearing or trial said Dr. J. E. Kinney is available as a witness and subject to the subpoena of the Board and it is possible to produce him at the trial and for him there to testify, then and in such event this stipulation shall be of no force or effect in connection with said hearing or trial.

2. That over a period of years Dr. J. E. Kinney was the family physician of Mr. E. B. Hendrie; that he was consulted by Mr. Hendrie July 11, 1927, and at that time Mr. Hendrie gave him his history as having had no illness, except occasional slight attacks of rheumatism; that his appetite was good; that he slept well, and that he had no pains or symptoms of trouble anywhere, but that he came to be checked up, which was something he did periodically.

That Dr. Kinney gave Mr. Hendrie a careful examination at that time and found normal heart action except pulse slightly accelerated, lungs normal, blood pressure 74-122; examination of urine showed a normal condition. Mr. Hendrie was mentally clear and concise in his statements, free from suspicion or trace of any abnormality and reflexes were normal; that at that time Mr. Hendrie was eighty [fol. 41] years and six months old, and that his physical

and mental conditions were much better than the average of persons of his age.

Dr. Kinney had known Mr. Hendrie very intimately for many years prior to this examination, and afterwards to the time of his death, which took place on July 15, 1932, and that Dr. Kinney never had seen any evidences of any disease or abnormal conditions until several years after the said examination of July 11, 1927; that at no time during the period of Dr. Kinney's friendship with Mr. Hendrie, nor at the time of said examination did Mr. Hendrie indicate any fear or expectancy of death, but at all times spoke of plans for business activities, trips and other matters connected with his current life; that Dr. Kinney was Mr. Hendrie's attending physician in his last illness, and that the primary cause of his death was acute pyelo-nephritis.

Grant, Ellis, Shafroth & Toll, Erl H. Ellis, C. Clifton Owens, Attorneys for Petitioners. (Sgd.) Robert H. Jackson, Attorneys for Respondent.

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EXHIBIT "E" TO STIPULATION OF FACTS

Affidavit of Frank N. Bancroft

I hereby state that I am the Frank N. Bancroft, attorney at law, Denver, Colorado, named in the Stipulation in the above entitled matter relative to my testimony and that I have read said Stipulation and that the matters set forth and statements made in Paragraph 2 of said Stipulation constitute a correct recital of my knowledge and recollection of the matters therein referred to involving my drafting of a trust agreement for Edwin B. Hendrie, and that if I were placed on the stand I would testify as true in substance as set forth in said paragraph 2.

Frank N. Bancroft.

Subscribed and sworn to before me this 15 day of March, 1935. Alma B. Fitzer, Notary Public. My notarial commission expires March 1, 1936.

Stipulation

[fol. 42] Whereas, this matter involves, among other things, the question of whether or not Edwin B. Hendrie executed a trust agreement on January 7, 1927, in contem-

plation of death or in contemplation of his continued life; and

Whereas, the Petitioners have made application for an order to take the deposition of Mr. Frank N. Bancroft, attorney at law, University Building, Denver, Colorado; and

Whereas, it seems expedient to the parties to stipulate concerning the testimony of said witness so that the same may be available to the Petitioners if by any chance said witness is not available at the time of any hearing in this matter before the United States Board of Tax Appeals:

Now, Therefore, It is stipulated and agreed between the parties hereto as follows:

1. That said Frank N. Bancroft would testify, if now examined pursuant to commission or stipulation, generally as set forth in paragraph 2 hereof, and, that to avoid the taking of his deposition, it is understood between the parties that the result of taking his deposition would be the producing of the evidence set forth in paragraph 2 hereof, and that such paragraph 2 may be introduced as evidence by either party hereto at the time of any hearing or trial of this matter before the United States Board of Tax Appeals with the same force and effect as though said Frank N. Bancroft had appeared in person before said Board and so testified, and with the same force and effect as though his deposition were now taken and such testimony set forth in such deposition and said deposition were introduced at said hearing or trial; Provided, however, that if at the time of any such hearing or trial said Frank N. Bancroft is available as a witness and subject to the subpoena of the Board and it is possible to produce him at the trial and if it is possible for him to there testify, then and in such events this stipulation shall be of no force or effect in connection with said hearing or trial.

2. That in the fall of 1926 and in the winter of 1926-1927 Frank N. Bancroft was the trust officer of The Colorado National Bank, having been employed in that capacity for several years and having practiced law in Denver for a great many years.

[fol. 43] That in the latter part of 1926 Edwin B. Hendrie, then President of Hendrie & Bolthoff Manufacturing and Supply Company at Denver, Colorado, requested Mr. Bancroft to meet Mr. Hendrie at the latter's place of business

and Mr. Hendrie then explained to Mr. Bancroft for the first time that Mr. Hendrie had been considering for a considerable period how he might best transfer a part of his assets in the interest of his daughter, Gertrude Hendrie Grant, her descendants and for her heirs; so that, whatever might happen to his own financial affairs in the future, such persons would be provided for.

Mr. Hendrie discussed with Mr. Bancroft the then present and future needs of his daughter and her children, also the character of securities that he desired to put into the trust, and what sort of provisions should be made to protect these securities and yet provide for his daughter and her children.

Mr. Hendrie expressed the direct wish that The Colorado National Bank should act as trustee in such connection.

Mr. Hendrie stated to Mr. Bancroft that the amount he wished to place in the trust would constitute about one-third of his then fortune, and would be made up of those securities of the more stable sort, requiring the least attention.

Subsequent to the first interview Mr. Bancroft and Mr. Hendrie met frequently both at Mr. Hendrie's place of business and at midday luncheons and several drafts of trust agreements were prepared and submitted by Mr. Bancroft, and discussed with Mr. Hendrie.

Mr. Hendrie expressed at many of the aforesaid meetings with Mr. Bancroft the thought that after he made this trust agreement he would then have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish and that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in said trust deed and thereby putting it entirely beyond his own power to otherwise dispose of the same contrary to the provisions of the said trust deed and to remove it from the vicissitudes of his speculations. Mr. Hendrie expressed doubt as to the stability of the market and expressed a desire to "play on the market" more actively and in a more speculative way than in the past. Mr. Hendrie often spoke of his intention of thus [fol. 44] occupying himself for the rest of his life, and in giving less time to the Hendrie and Bolthoff business.

Mr. Hendrie at all times indicated that his thought was how to word the trust agreement so that, whatever might happen to him financially in the future and in regard to his remaining fortune, the corpus of the trust would in nowise

be jeopardized thereby, or prevent the disposition of said corpus in the manner provided for in said trust deed.

That the result of the numerous meetings and discussions was the final signing of the trust agreement of January 7th, 1927.

That at all times that Mr. Bancroft talked with Mr. Hendrie during the preparation of said trust agreement and for several years thereafter Mr. Hendrie appeared to be in good health, actively managing his own business affairs, and that Mr. Bancroft kept in constant touch with him as trust officer at said bank in regard to the workings of the trust agreement.

That at no time in said discussion did Mr. Hendrie indicate that he entertained any thought of impending death or that he expected his death within the immediate or reasonably near future, nor did he discuss the problem of avoidance of death or inheritance taxes nor discuss any problems as to the disposition of the rest of his fortune.

Grant, Ellis, Shafroth & Toll, Erl H. Ellis, C. Clifton Owens, Attorneys for Petitioners. Robert H. Jackson, Attorney for Respondent.

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EXHIBIT "F" TO STIPULATION OF FACTS

Affidavit of W. W. Grant

I hereby state that I am the W. W. Grant, son-in-law of Edwin B. Hendrie, Denver, Colorado, named in the stipulation in the above entitled matter relative to my testimony, and that I have read said stipulation, and that the matters set forth, and the statements made in paragraph 2 of said stipulation constitute a correct recital of my knowledge and recollection of the matters therein referred to, involving my [fol. 45] professional activities with reference to Edwin B. Hendrie, and that if I were placed on the stand I would testify as true, in substance, those matters set forth in said paragraph 2.

W. W. Grant.

Subscribed and sworn to before me this 4th day of October, A. D. 1935. My commission expires April 16th, 1936. Dorothy D. Edwards, Notary Public. (Seal.)

Stipulation

Whereas, this matter involves, among other things, the question of whether or not Edwin B. Hendrie executed a trust agreement on January 7, 1927, in contemplation of death or in contemplation of his continued life; and,

Whereas, the petitioners have made application for an order to take the deposition of W. W. Grant, 730 Equitable Building, Denver, Colorado; and,

Whereas, it seems expedient to the parties to stipulate concerning the testimony of the said W. W. Grant so that the same may be available to the Petitioners if by any chance said witness is not available at the time of any hearing in this matter before the United States Board of Tax Appeals;

Now, Therefore, It is stipulated and agreed between the parties hereto as follows:

1. That said W. W. Grant would testify, if now examined, pursuant to commission or stipulation, generally as set forth in paragraph 2 hereof, and that to avoid the taking of his deposition, it is understood between the parties that the result of taking his deposition would be the producing of the evidence set forth in paragraph 2 hereof, and that such paragraph 2 may be introduced as evidence by either party hereto at the time of any hearing or trial of this matter before the United States Board of Tax Appeals with the same force and effect as though said W. W. Grant had appeared in person before said Board and so testified, and with the same force and effect as though his deposition were now taken and such testimony set forth in said deposition and said deposition were introduced at said hearing or trial; Provided, however, that if at the time of any such [fol. 46] hearing or trial said W. W. Grant is available as a witness and subject to the subpoena of the Board, and it is possible to produce him at the trial and for him there to testify, then and in such event this stipulation shall be of no force and effect in connection with said hearing or trial.

2. That W. W. Grant was the son-in-law of Edwin B. Hendrie and knew him intimately through constant, almost daily association, since April, 1910; that he was more or less familiar with the business affairs of the said Edwin B. Hendrie and was in a position to know something of them, as well as of his health and general activities for many years prior to the death of the said Edwin B. Hendrie.

That the said Edwin B. Hendrie appeared to be in excellent health and spirits up to within a few months of the date of his death; that until the last year of his life he spent each winter in California, going and returning by himself; that he was in the habit of speculating on a considerable scale, particularly during the last five or six years of his life; that at one time he stated to the said W. W. Grant that his daughter and his grandchildren would be adequately provided for in the event of his, the said Hendrie's death, through the medium of a trust which he had created, regardless of his operations on the Stock Exchange.

That the said W. W. Grant kept the books of the said E. B. Hendrie during the latter part of his, the said Hendrie's life, and was as a result familiar with his operations; that he first learned of the said trust about 1930 when the said Hendrie made the statement above mentioned; that up until six months of the date of his death the said Hendrie took regular daily exercise by means of walks, setting-up exercises, and occasional games of golf, and read market reports and services up until his last illness, all the time maintaining and expressing a lively interest in the future trend of American business and markets.

Grant, Ellis, Shafroth & Toll, Erl H. Ellis, C. Clifton Owens, Attorneys for Petitioners.

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[fol. 47] EXHIBIT "G" TO STIPULATION OF FACTS

Last Will and Testament of Edwin B. Hendrie

Know All Men by These Presents:

That I, Edwin B. Hendrie, a resident of the City and County of Denver, in the State of Colorado, being of sound mind and memory do hereby make, publish and declare this to be my last Will and Testament, hereby revoking all other Wills and Testaments heretofore made by me.

First. I direct my Executors to pay all of my just debts as soon as practicable.

Second. I give and bequeath to my sister, Mrs. R. J. Cory, of Presidio, California, if she is alive at the time of my death, and if not then to her heirs at law under the intestate laws of the State [E. B. H.] of Colorado, the sum of Eight Thousand Dollars ($8,000.00).

Third. I give and bequeath to my niece, Gladys Hendrie, of Orange, New Jersy, if she is alive at the time of my death, and if not then to her heirs at law under the intestate laws of the State of Colorado, the sum of Four Thousand Dollars ($4,000.00).

Fourth. I give and bequeath to my nephew, Charles Hendrie, of Orange, New Jersey, if he is alive at the time of my death, and if not then to his heirs at law under the intestate laws of the State of Colorado, the sum of Four Thousand Dollars ($4,000.00).

Fifth. I give and bequeath to my niece, Marion True Reynolds, of Boulder, Colorado, if she is alive at the time of my death, and if not then to her heirs at law under the intestate laws of the State of Colorado, the sum of Four Thousand Dollars ($4,000.00).

Sixth. I give and bequeath unto St. John's Church in the Wilderness, of Denver, Colorado, the sum of Ten Thousand Dollars ($10,000.00), for the purpose and installation in the Cathedral of said church of a memorial window bearing the inscription "Suffer Little Children to Come Unto Me" in memory of my beloved wife, Marian C. Hendrie.

Seventh. I give, devise and bequeath unto my daughter Gertrude Hendrie Grant, of Denver, Colorado, and to her [fol. 48] heirs and assigns forever, my residence property (realty and personalty), in Denver, Colorado, with all of its furnishings and contents.

Eighth. I give, devise and bequeath unto my daughter, Gertrude Hendrie Grant, and unto The Colorado National Bank of Denver, a national banking association, doing business in the City and County of Denver, State of Colorado, as Trustees, and in the event of the death, resignation or refusal to act of my said daughter, then to The Colorado National [E. B. H.] Bank of Denver as sole Trustee, all of the rest, residue and remainder of my estate, real, personal and mixed of every kind and character that I may own or have any interest in at the time of my death, to hold, manage, and dispose of under the following trust, to-wit:

I direct my Trustees, or my Trustee as the case may be, to take over, manage, invest and reinvest my trust estate in such manner and in such securities and properties as they or it in their or its uncontrolled discretion may think best

without obtaining any order of Court therefor, and I direct my Trustees as well as my Executors to pay to my daughter, Gertrude Hendrie Grant, from the time of my death so long as she shall live the sum of Five Thousand Dollars ($5,000.00) a month, and from the time of the closing of my estate by my Executors to pay to my grandson, Edwin Hendrie Grant, who is now sixteen (16) years of age, to my grandson, William West Grant III, who is now fourteen (14) years of age, to my granddaughter, Melanie Mortimer Grant, who is now eleven (11) years of age, all being children of my said daughter, Gertrude Hendrie Grant, and to any other child or children who may hereafter be born to my daughter, Gertrude Hendrie Grant, the sum of Four Thousand Dollars ($4,000.00) per year to each of said grandchildren to be paid in equal monthly installments until the then youngest living child of said three children of my daughter who are now living has reached the age of thirty (30) years, at which time, if my said daughter Gertrude Hendrie Grant, is then deceased, and if she is not then deceased, then thereafter at the time of her decease, I direct my Trustee to turn over, deliver and convey all of the remainder of my said trust estate equally to the then living children of my said daughter, Gertrude Hendrie Grant, [E. B. H.] and to the descendants of any deceased child of my said daughter, Gertrude Hendrie Grant, the descendants taking per stirpes and not per capita, that is, the descendants taking the share that their respective parents would have [fol. 49] taken if living. During the minority of any of my said grand children I direct my Trustees to make all payments heretofore directed to be made to them, to their mother Gertrude Hendrie Grant if she is alive and her receipt to my Trustees for such payments shall be a full acquittance to my said Trustees.

In order that my said Trustees, or my said Trustee as the case may be, may be enabled to carry out the terms of my said trust, I do hereby give and grant unto my said Trustees or my said Trustee as the case may be, full power and authority to sell, convey, lease, exchange, mortgage, assign and transfer or otherwise dispose of any part or all of my said trust estate to such person or persons, upon such terms and for such price or prices as they or it may in their or its uncontrolled discretion think best without the purchaser being obliged to look to the application of the

purchase money paid therefor; to execute and deliver deeds of conveyance, mortgages, leases, assignments, bills of sale and each and every other instrument which may be, or may seem necessary or proper in connection with the management and disposition of the properties of said trust estate; to invest and reinvest the proceeds arising from the sale, mortgaging, transfer, assignment or other disposition or from the income from any of the properties of said trust estate; to purchase and otherwise acquire any and all kinds of property including real estate, stocks, bonds, notes and choses in action of every kind and nature; to collect, recover and [E. B. H.] receive rents, income and profits from the properties constituting said trust estate; to loan any and all moneys belonging to said trust estate on such terms and conditions as my said Trustees or my said trustee as the case may be, may deem proper; to improve in such manner as my Trustees or my Trustee may think best any real estate belonging to my said trust estate and to do any and all other things that my Trustees or my Trustee may think necessary or proper in order to fully manage, invest and dispose of my trust estate as they in their uncontrolled discretion may think best, as fully and completely as I could do if living, and I direct that no bond shall be required of my Trustees or of my Trustee as the case may be for the faithful performance of their or its duties as such.

Ninth. I hereby nominate, constitute and appoint my daughter, Gertrude Hendrie Grant, and The Colorado National Bank of Denver, Executors of this my last Will and Testament, with all of the powers heretofore and herein [fol. 50] conferred upon my Trustees, and I direct that no bond shall be required of my Executors for the faithful performance of their duties as such.

In Witness Whereof, I have hereunto set my hand and seal and have initialed on the margin thereof each of the preceding four pages of this my last Will and Testament, at Denver, Colorado, this 26th day of January, A. D. 1925.

Edwin B. Hendrie. (Seal.)

Signed, sealed, published and declared by the said Testator, Edwin B. Hendrie, who is of sound mind and memory, [E. B. H.] more than twenty-one years of age and under no restraint or duress of any kind, as and for his last Will and

Testament, in the presence of us who, at his request, in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses on the day of the date thereof.

George B. Berger, Denver, Colorado. Theron F. Field, Denver, Colorado. Merriam Berger, Denver, Colorado.

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Before United States Board of Tax Appeals

Praecipe for Record—Filed April 27, 1937

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Tenth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:

(a) Petition, including annexed copy of deficiency letter.
(b) Answer.

3. Memorandum opinion and decision of the Board.
[fols. 51-52] 4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
5. Stipulation of facts and exhibits A to G, both inclusive, attached thereto.
6. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record, not included in record.
7. This praecipe.

(Signed) Herman Oliphant, General Counsel for the Department of the Treasury.

Service of a copy of the within praecipe is hereby admitted this 23 day of April, 1937.

Grant, Ellis, Shafroth & Toll, (Sgd.) Erl H. Ellis, Attorney for Respondent.

Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 53] Minute entries of argument and submission omitted in printing.

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IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

No. 1566

JANUARY TERM, 1938

Warren F. Wattles (James W. Morris, Assistant Attorney General, Sewall Key, Norman D. Keller and S. Dee Hanson, Special Assistants to the Attorney General, were with him on the brief) for petitioner.

W. W. Grant (Grant, Shafroth & Toll were with him on the brief) for Respondents.

Before Lewis, Bratton and Williams, Circuit Judges

OPINION—January 31, 1938

BRATTON, Circuit Judge, delivered the opinion of the court.

[fol. 54] This petition for review of a decision of the Board of Tax Appeals presents the question of liability for a deficiency in estate taxes. Edwin B. Hendrie, a resident of Denver, Colorado, established an irrevocable trust on January 7, 1927, and died on July 15, 1932. The executors named in his will filed an estate tax return which failed to include the value of the trust as a part of the gross estate. The Commissioner of Internal Revenue determined that the transfer to the trust was made in contemplation of death of decedent and to take effect in possession or enjoyment at or after his death; and that the value of the trust at the date of death should be included in the gross estate. A deficiency in death transfer taxes followed. The Commissioner advanced the single contention before the Board that the transfer was made in contemplation of death. The Board decided otherwise, and on recomputation reduced the deficiency to a relatively small sum. The Commissioner seeks review and renews the contention.

Decedent was eighty years of age at the time the trust was created, and he was past eighty-five at the date of his death. The trust instrument named the Colorado National Bank as trustee, and provided that the trustee should have and exercise all of the powers of management and control of the property constituting the trust that decedent would have if he were then in the sole and absolute possession and control of it, except that during his life all sales of securities and reinvestments should be subject to his approval; that the income accumulating during the life of decedent should be added to the corpus and treated as principal; that after his death the net income, or so much thereof as she might call for, should be paid to Gertrude Hendrie Grant, daughter of the decedent, during her life; that upon the death of such daughter, the estate should be paid equally to her then living children and to the descendants of any deceased child, such descendants taking per stirpes and not per capita; that in the event the daughter should die leaving no child or children or descendants of any child surviving her, the estate should be delivered and conveyed to her heirs at law under the then intestate laws of the State of Colorado; that no title in any part of the trust or the income accruing thereto should vest in any beneficiary during the continuance of the trust; and that no beneficiary should anticipate, encumber, assign, or transfer his or her interest therein prior to the actual distribution. Securities of the face value of $827,000.00 were [fol. 55] enumerated as the trust property, and decedent reserved the right to make additions thereto from time to time. The return made by the executors reported a gross estate of $938,006.38. That was exclusive of the property transferred to the trust.

By stipulation, verified statements of the trust officer of the bank, a physician, and the son-in-law of decedent were submitted in lieu of their testimony; and no other testimony was offered. The trust officer stated that decedent conferred with him several times concerning the preparation of the trust instrument. He discussed in the conferences the then present and future needs of his daughter and her children; he stated that he had considered for some time the method through which he might transfer a part of his assets in the interest of his daughter and her descendants so that they would be provided for whatever might happen to his own financial affairs in the future; that the amount he wished to transfer to the trust would constitute about

one-third of his present fortune; that after making the trust he would still have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish; and that the purpose in creating the trust was to transfer the trust corpus in that manner thereby putting it beyond his power to dispose of the property otherwise, and thus remove it from the vicissitudes of his speculations. He indicated that the dominant thought in mind was to so word the trust agreement that whatever might happen to him financially in respect to his remaining property, the corpus of the trust would not be jeopardized. He did not indicate that he entertained any thought of impending death, or that he expected death in the immediate or reasonably near future, and he did not discuss the problem of avoiding death or inheritance taxes. The physician stated that decedent consulted him on July 11, 1927, and had a periodical examination. He gave the physician a history of no illness, except occasional slight attacks of rheumatism. He stated that his appetite was good; that he slept well; that he had no pains or symptoms of trouble; and that he had come for a check-up. Upon careful examination, the physician found normal heart action except slightly accelerated pulse, normal lung action, normal condition of the urine, and blood pressure of 74-122. His reflexes were normal, his mental condition clear, his statements concise, and he was free from suspicion or trace [fol. 56] of abnormality. It was the opinion of the physician that his physical and mental condition was much better than that of the average person at that age. The cause of death was acute pyelo-nephritis. The son-in-law, engaged in the practice of law at Denver, stated that he was more or less familiar with the business affairs of decedent and was in position to know something about them, as well as his health and general activities; that decedent appeared to be in excellent health and spirits up to within a few months of his death; that until the last year of his life, he spent each winter in California, making the trip each way alone; that he speculated on a considerable scale, particularly during the last five or six years of his life; that on one occasion in 1930 he stated to his son-in-law that regardless of his operations on the stock exchange, his daughter and grandchildren would be adequately provided for in the

event of his death through the medium of a trust which had been created; that the son-in-law first learned of the trust through that statement; that up until six months of the date of his death, the decedent took regular daily exercise by means of walks, setting-up exercises and occasionally games of golf; that he read market reports and services up until his last illness; and that at all times he maintained and expressed a lively interest in the future trend of business and markets.

Decedent made a will in 1925, in which it was provided that all of his estate, except his residence in Denver which was bequeathed to his daughter and five legacies in cash aggregating $30,000.00, should be placed in trust for the benefit of his daughter and her children with remainders to the children. His daughter and the Colorado National Bank were named as trustees and as executors; and they were directed to make periodical cash payments to the daughter and her children. That will was in effect at the time the trust was created.

Section 301 of the Revenue Act of 1926 (44 Stat. 9), lays a tax at progressively graduated percentages upon the net estate of every decedent dying after the effective date of the act. The substance and effect of the material part of section 302c is to provide that the value of property transferred to a trust shall be included in the gross estate if the transfer was made in contemplation of death. The initial provision of this kind was contained in the Revenue Act of [fol. 57] 1916, and similar legislation has found its way into the several subsequent revenue measures. The purpose of such legislation is to reach substitutes for testamentary disposition of property and thus to prevent evasion of the tax. Nichols v. Coolidge, 274 U. S. 531; Milliken v. United States, 283 U. S. 15; United States v. Wells, 283 U. S. 102. And the power of Congress to provide that property transferred in that manner shall be included in the gross estate of a decedent is not open to doubt. Heiner v. Donnan, 285 U. S. 312.

In the very nature of things it is impossible to define with precision the transactions which fall within the ambit of the statute. Each case must be determined by its own facts and circumstances. The statute is not confined to gifts causa mortis. It may include gifts inter vivos which are irrevocable and indefeasible. The test lies in the motive for

the transfer. If the generating source of the motive is associated with life, the transfer is not made in contemplation of death. But if the generating inducement is associated with death, either immediate or distant, the transfer is made in such contemplation. A gift is made in contemplation of death where the dominant motive of the donor is to make proper provision for the object of his bounty after the death of the donor. Stated, otherwise, it is sufficient to support the tax if the transfer is motivated by the same considerations as those which prompt testamentary disposition of property without awaiting death. United States v. Wells, supra; Heiner v. Donnan, supra; Becker v. St. Louis Trust Co., 296 U. S. 48; Willcuts v. Stoltze, 73 F. (2d) 868; Igleheart v. Commissioner, 77 F. (2d) 704. In determining the motive which prompts a transfer appropriate consideration should be given to such factors as the time intervening between the date of the transfer and death, age, condition of body and mind, desire to be relieved of responsibility, desire to subject the donee to responsibility, desire to discharge moral obligations, a purpose to continue a previously adopted policy, and others of that nature.

Here the decedent was eighty years of age at the time of the transfer. There is no suggestion that he had made similar transfers or had pursued a policy of making large gifts to his daughter and her children. He had executed a will in which it was provided that virtually all of his estate should be placed in trust for their benefit, and it was still [fol. 58] in effect. He stated to the trust officer of the bank in the course of their conferences concerning the preparation of the trust instrument that he desired to make the transfer in the interest of his daughter and her children so that they would be provided for whatever might happen to his own financial affairs in the future; that the amount he wished to transfer would constitute about one-third of his then existing fortune; that after making the transfer he would still have his more speculative securities left, and would feel free for the rest of his life to speculate in whatever securities he might select; and that the instrument should be so worded that whatever might happen to him financially in respect to his remaining property, provision would be made for his daughter and her heirs. He discussed the kind of provisions which should be included in the instrument to protect the securities, and yet provide for his

daughter and her children. He did speculate on a considerable scale, particularly during the last five or six years of his life which included the time after the transfer; and he stated to his son-in-law that regardless of his operations on the stock exchange, in the event of his death his daughter and the grandchildren would be adequately provided for through the trust which had been established. The trust was not designed to make provision for the beneficiaries during his life. None of the property or the increment thereto was to reach them until after his death. Neither was it designed to enable him to engage in speculation. He could have done that unfettered and unrestrained without the establishment of the trust. But in its absence the property transferred would have been subject to the hazards of speculation. It would have been within reach of creditors if he lost all. The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that certainty was gratified by the transfer. The purpose was a commendable one, but the generating motive for a transfer made in such circumstances is associated with death. It follows that the trans- [fol. 59] fer was made in contemplation of death within the meaning of the statute, though decedent was in sound health of body and mind and did not entertain thought of death immediately or in the near future. United States v. Wells, supra; Igleheart v. Commissioner, supra; Farmers' Loan & Trust Co. v. Bowers, 68 F. (2d) 916, certiorari denied 293 U. S. 565.

The case of Brown v. Commissioner, 74 F. (2d) 281, is not to the contrary. There the donor had made gifts to members of his family from time to time for twenty years, in order to provide them with independent incomes during his life. The particular gift in question was made to his wife in continuance of that policy, and to afford her immediate protection against the vicissitudes of his speculations. He

did not state or intimate at any time that he had in mind making provision for her after his death in the event he lost everything else. Here the decedent stated that purpose to be his motive. That difference is controlling.

It is settled law that a finding of fact made by the Board of Tax Appeals will not be disturbed on review if it is supported by substantial evidence. But whether there is substantial evidence to support a finding is a question of law. Folk v. Commissioner, 67 F. (2d) 779. And a finding not thus supported will be set aside. Champlin v. Commissioner, 71 F. (2d) 23. We fail to find any substantial evidence that the transfer under consideration was not made in contemplation of death within the meaning of the statute.

The decision of the Board is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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DISSENTING OPINION

LEWIS, Circuit Judge, dissents:

The Commissioner claims the trust was set up by Mr. Hendrie in contemplation of death within the meaning of section 302(c) of the Revenue Act of 1926. That is the issue. I disagree with the majority. To me it seems clear from the uncontradicted testimony that Mr. Hendrie's gift to his daughter and her children was not made in contemplation of death but in order that he might speculate upon the stock market for the remainder of his life more actively than he had in the past without fear that the part of his fortune thus given might be lost. He manifested no other intent and [fols. 60-64] purpose in that respect. He did speculate on the stock market during the last five or six years of his life on a considerable scale. Future business activities were contemplated, not death. In my opinion the decision of the Board of Tax Appeals is amply supported by the evidence.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—January 31, 1938

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the United States Board of Tax Appeals in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to said United States Board of Tax Appeals for further proceedings not inconsistent with the opinion of this court; and that Commissioner of Internal Revenue, petitioner, have and recover of and from The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, deceased, respondents, his costs herein.

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[fol. 65] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

No. 1566

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

THE COLORADO NATIONAL BANK OF DENVER and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Respondents

Appeal from the United States Board of Tax Appeals

PETITION FOR REHEARING—Filed March 1, 1938

To the United States Circuit Court of Appeals for the Tenth Circuit and the Judges Thereof:

Come now The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Respondents in the above entitled cause, and present this, their petition, for a rehearing of the above entitled cause and in support thereof respectfully show:

[fol. 66] 1. The court has disregarded the opinion of the Board of Tax Appeals which found that in view of all of the circumstances of the case the gift was not made in contemplation of death. It has substituted its own opinion on this question of fact for the finding of the Board. This is beyond its power.

2. The court has disregarded all evidence as to motive save the language of the trust deed itself. The majority opinion in effect creates a conclusive presumption that gifts in trust, the income of which is withheld from the beneficiary till after donor's death, are in contemplation of death. This is contrary to the statute, the Treasury regulations and the decisions of the United States Supreme Court, particularly Shukert v. Allen, 273 U. S. 545, 47 S. Ct. 461, 71 L. Ed. 764; Reinecke v. Northern Trust Company, 278 U. S. 339, 73 L. Ed. 410; and McCormick v. Burnet, 283 U. S. 783, 75 L. Ed. 1413.

3. The majority opinion has confused gifts "in contemplation of death" and those "intended to take effect in possession or enjoyment at or after death." The government makes no claim that the Hendrie gift falls in the latter class because, being irrevocable, it is not taxable as such, May v. Heiner, 281 U. S. 238, 74 L. Ed. 826, Reinecke v. Northern Trust Company, 278 U. S. 339, 73 L. Ed. 410. Yet the court makes the conclusive presumption that such gifts held not taxable under the second statutory class are taxable under the first. The history of the law and the regulations show this to be unsound.

4. The majority opinion misconstrues the statutory provision providing for the taxation of gifts "in contemplation of death." The court has confused the meaning of "contemplation of death" with the expression "associated with death," failing to differentiate between "contemplation of death" and the "general expectation of death" common to all men which does not bring a transfer within the statutory meaning.

5. The majority opinion has confused lifelong desire to care for one's children common to all men with the immediate and moving cause of the gift in this case. Contemplation of the danger of his proposed speculations—not contemplation of death—prompted the Hendrie trust.

[fol. 67-68] Wherefore, upon the foregoing grounds it is respectfully urged that the petition for rehearing herein be granted, and that the majority opinion of this court be withdrawn, and that an opinion be rendered herein affirming the United States Board of Tax Appeals in its holding that the gift is not taxable.

Respectfully submitted, Grant, Shafroth and Toll,
Morrison Shafroth, Counsel for Respondents.

Certificate of Counsel

I, Morrison Shafroth, counsel for the above named The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Morrison Shafroth.

[File endorsement omitted.]

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[fol. 69] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—April 4, 1938

This cause came on to be heard on the petition of respondent for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

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In United States Circuit Court of Appeals

Motion for Stay of Mandate—Filed April 6, 1938

Come now The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Respondents in the above entitled cause, by their attorneys, Grant, Shafroth and Toll and Morrison Shafroth, and move that the court enter an order staying the issuance of the mandate in said cause for thirty (30) days from this date, and as reasons for said motion, they respectfully represent that said period of time is necessary to enable Respondents to apply to the United States Supreme Court for issuance of a writ of certiorari, which application will be made in the immediate future.

Dated this 6th day of April, 1938.

Respectfully submitted, Grant, Shafroth & Toll, Morrison Shafroth, Attorneys for Respondents.

*Duly sworn to by W. W. Grant. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 70] In United States Circuit Court of Appeals

Order Granting Stay of Mandate—April 6, 1938

This cause came on to be heard on the motion of respondents for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

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Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 71] Supreme Court of the United States

Order Allowing Certiorari—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Endorsed on cover: File No. 42,489. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 30. The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, petitioners, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed May 2, 1938. Term No. 30, O. T., 1938.

[redacted] 30

In the

# Supreme Court of the United States

OCTOBER TERM, 1937.

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THE COLORADO NATIONAL BANK OF DENVER and [redacted] HENDRIE GRANT, Executors of the Estate of Edwin B. Hendrie, Deceased, PETITIONERS,

*v.*

COMMISSIONER OF INTERNAL REVENUE.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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MORRISON SHAFROTH,
Denver, Colorado,
*Attorney for Petitioners.*

*Of Counsel:*
W. W. GRANT,
HENRY W. TOLL,
Denver, Colorado.


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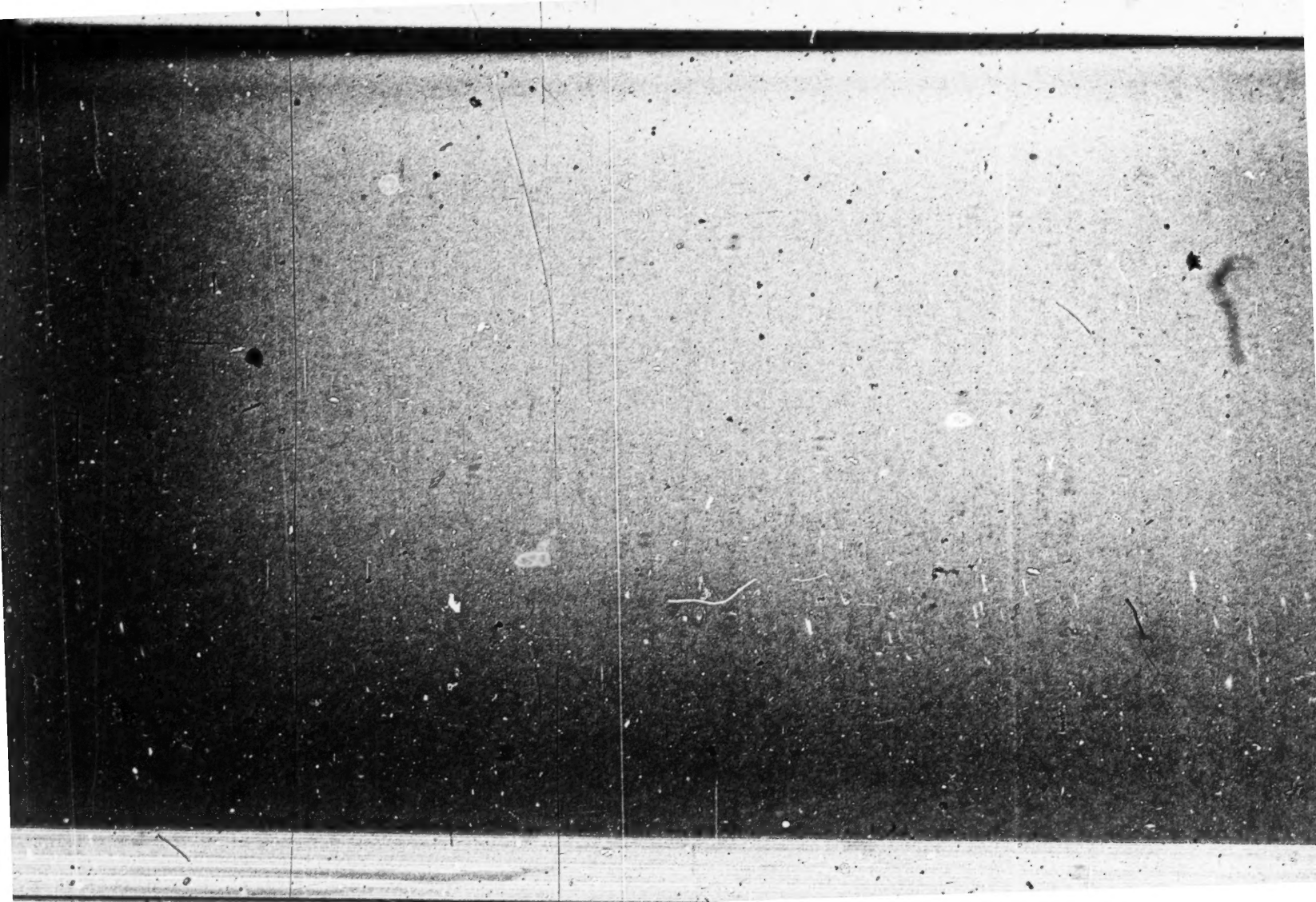

# INDEX.

## AUTHORITIES CITED.

In the

# Supreme Court of the United States

OCTOBER TERM, 1937.

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No.....

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THE COLORADO NATIONAL BANK OF DENVER and GERTRUDE HENDRIE GRANT, Executors of the Estate of Edwin B. Hendrie, Deceased, PETITIONERS,

*v.*

COMMISSIONER OF INTERNAL REVENUE.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, petitioners, respectfully pray for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered January 31, 1938 (R. p. 60). Rehearing denied April 4, 1938 (R. p. 97).

### QUESTIONS PRESENTED.

1. Whether the decedent's irrevocable transfer, effected by the declaration of trust dated January 7, 1927, was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

2. Whether an irrevocable gift in trust (without reservation of income to donor), the actual use of which is

intended to be withheld from the beneficiaries until after donor's death, is, because of such provision, as a matter of law in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

3. Whether a trust for the purpose of preserving property from loss in the stock market is testamentary and taxable as in contemplation of death because of an ultimate intent to provide by the trust for donor's descendants after his death.

4. Whether the determination by the Board of Tax Appeals that the gift is not in contemplation of death, based on the undisputed evidentiary facts of good health, commendable motive to save property from loss, anticipation of future business activity, lack of thought of death immediately or in the near future, and continued life for more than five years, can be overturned by the Circuit Court of Appeals because it draws an opposite inference from the same evidentiary facts.

5. Whether there was substantial evidence to sustain the determination of the Board.

## STATEMENT.

Five and one-half years before his death, Edwin B. Hendrie created on January 7, 1927, an irrevocable trust (Exhibit B, R. p. 10) of approximately $827,000.00, the income to accumulate and to be added to the principal during his life, and on his death the income to be paid to his daughter with remainder over to her children. He died on July 15, 1932, at the age of eighty-five years and six months (R. p. 35).

Petitioners are executors of his estate and on the Federal Estate Tax Return reported a gross estate of $938,006.68 (R. p. 36). The trust assets were not included. The Commissioner of Internal Revenue in a deficiency notice, September 13, 1934, added the amount of $1,034,074.22,

representing the value at Mr. Hendrie's death of the property transferred to the trust (R. p. 37) and asserted a deficiency tax in the amount of $188,108.28 (R. p. 36).

Petitioners appealed to the Board of Tax Appeals, December 8, 1934 (R. p. 3) and in a stipulation of facts filed May 19, 1936, all of the foregoing facts were stipulated. In addition all of the evidence was stipulated and was undisputed (R. p. 35).

The undisputed testimony of decedent's physician (R. p. 40), his son-in-law (R. p. 46) and his lawyer (R. pp. 42-44) was to the effect that decedent until shortly before his death and at and long after the execution of the trust was in good health, had had no serious illness, was without symptom of disease (R. pp. 40-41), was active in business, exercised regularly, taking setting-up exercises and walks, played golf, took annual trips alone to California and at the time of the execution of the trust was contemplating speculation in the stock market and thereafter did so speculate on a considerable scale (R. p. 46). The reason he gave to the trust officer for the creation of the trust was "that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in said trust deed and thereby putting it entirely beyond his own power to otherwise dispose of the same contrary to the provisions of the said trust deed and to remove it from the vicissitudes of his speculations" (R. p. 43). At his death the value of the trust was greater than the value of his estate.

There was no discussion of avoidance of death or inheritance taxes or of the disposition of the balance of his estate, nor is there anywhere in the record any evidence of a desire to avoid the estate tax or any discussion of it (R. p. 44). His will (R. pp. 47-50) had been drawn some two years before the creation of the trust. "The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until

after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death." (From Opinion of Board of Tax Appeals, R. p. 30.)

## STATUTE INVOLVED.

The statute involved is set out in the Appendix (infra p. 28).

## RULING OF THE BOARD OF TAX APPEALS AND OF THE COURT BELOW.

The Board of Tax Appeals, in a memorandum opinion entered September 19, 1936, not reported but appearing (R. pp. 28-30), found for the taxpayer (petitioners), holding the gift was not in contemplation of death. It said (R. pp. 29-30):

> "* * * Their point is that he made the transfer so that he would be free to speculate on the stock market for the rest of his life without fear that loss of his fortune would leave nothing for his daughter and her children. They point out that the donor made a complete gift and retained no possession or enjoyment to himself. They cite and rely upon Shukert v. Allen, 273 U. S. 545; McCormick v. Burnet, 283 U. S. 784; St. Louis Union Trust Co. v. Becker, 76 F. (2d) 851, affirmed 296 U. S. 48; Reinecke v. Northern Trust Co., 278 U. S. 339; Klein v. United States, 283 U. S. 231, among others. The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death. We think the transfer was not made in contemplation of death within the meaning of the statute as explained in United States v. Wells,

283 U. S. 102. Principles announced in the cases above listed control this case which is not distinguishable from one or more of those cases where, as here, income was to be accumulated until after the death of the donor. Therefore, on this point we hold for the petitioners."

The Circuit Court of Appeals (Judge Lewis dissenting) eversed the Board (R. pp. 53-60), 95 F. (2d) 160 (Advance heets). It held that (R. p. 58) "The trust was not designed o make provision for the beneficiaries during his life. None f the property or the increment thereto was to reach them ntil after his death * * *. The dominant purpose was to ake provision for his descendants after his death, in the vent his speculations proved tragic. It was to place that ubstantial amount of property in an asylum of immunity rom adverse consequences of speculation, in order to make ertain that it would be used for his daughter and her chilren after his death." The Court found "The purpose was commendable one," but that such a transfer is associated ith death, is testamentary in character, and as a matter of aw is in contemplation of death "though decedent was in ound health of mind and body and did not entertain thought f death immediately or in the near future" (R. p. 59). It eld, therefore, that there was no substantial evidence to pport the finding of the Board (R. p. 59).

Petition for rehearing was filed on March 1, 1938, and nied on April 4, 1938.

## REASONS FOR GRANTING WRIT.

1. The Circuit Court of Appeals has held that an irvocable gift in trust without reservation of income to the nor is as a matter of law in contemplation of death within meaning of Section 302 (c) of the Revenue Act of 1926 ause it provides for an accumulation of the income until er donor's death, thus preventing the beneficiaries from eiving it until that time. The intent to withhold the

use of the income is held to manifest an intent to provide for the beneficiaries after donor's death and to be therefore testamentary and equivalent to contemplation of death regardless of other factors.

This is in conflict with numerous decisions of this Court and of the Circuit Court of Appeals wherein it has been held that the postponement by trust instrument of the beneficiary's use and enjoyment until after donor's death does not make the gift taxable under the statute: *Shukert v. Allen*, 273 U. S. 545; *Reinecke v. Northern Trust Co.*, 278 U. S. 339; *May v. Heiner*, 281 U. S. 238; *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48; *Commissioner of Internal Revenue v. McCormick*, 43 F. (2d) 277; *Welch v. Hassett*, 90 F. (2d) 833 (Circuit Court of Appeals, First Circuit), affirmed in Supreme Court on a different point, February 28, 1938.

2. The Circuit Court of Appeals held that though the immediate purpose of the trust was the preservation of a part of donor's property from the danger of stock market speculations in which he was engaged, yet he desired to preserve it in order to be certain that his daughter and her children would be provided for after his death, and that his motive was therefore testamentary and in contemplation of death. This it held to be true, though he was in sound health of mind and body and did not entertain thought of death immediately or in the near future and though it found his purpose was commendable. There was no evidence or finding of any intent to evade taxes.

This is in conflict with and contrary to the decision of *United States v. Wells*, 283 U. S. 102, and *Commissioner of Internal Revenue v. McCormick et. al.*, 43 F. (2d) 277 (Circuit Court of Appeals, Seventh Circuit). (Reversed in United States Supreme Court (283 U. S. 783) on the ground that the gift was not taxable under the possession and enjoyment clause. The Court of Appeals had held it taxable under that clause though not under the contemplation of

clause.) In those cases the distinction is drawn be- "contemplation of death" and the general expecta- f death common to all, and it is held that the words "in mplation of death" mean that the thought of death is mpelling cause of the transfer, and that if the motive accomplish some purpose desirable to him if he con- to live, it is not within the meaning of the statute.

. The Circuit Court of Appeals has overturned the d of Tax Appeals' fact determination that the gift was contemplation of death though there was substantial nce to sustain it, as appears from the Court's own ment of the evidence.

This is in conflict with *Hulburd v. Commissioner of nal Revenue*, 296 U. S. 300; *McCaughn v. Real Estate Title & Trust Co.*, 297 U. S. 606; *Elmhurst Cemetery f Joliet v. Commissioner of Internal Revenue*, 300 U. ; *Neal v. Commissioner of Internal Revenue*, 53 F. 306 (Circuit Court of Appeals, Eighth Circuit); *Com- oner of Internal Revenue v. Sharp*, 91 F. (2d) 804 uit Court of Appeals, Third Circuit); which hold that ithout such power.

The question involved as to the meaning of the e in its application to trusts is one of great public tance. If the Circuit Court of Appeals' decision is t and the Supreme Court so finds, large amounts of ie otherwise unavailable will be collected by the Gov- nt. The claim generally asserted by the Commis- in the trust cases where income has been withheld eneficiaries until donor's death has been that they ntended to take effect in possession or enjoyment at r death. Such was his first position in this case. His ons, however, in this field have been greatly limited Court's decision in *May v. Heiner, supra*. If the Court of Appeals is correct in this case, many of es heretofore deemed beyond the reach of the stat- taxable. If not, petitioners and the taxpayers of

the Tenth Circuit should not be treated differently from others.

## CONCLUSION.

For these reasons it is respectfully submitted that this petition should be granted.

THE COLORADO NATIONAL BANK OF DENVER AND GERTRUDE HENDRIE GRANT,
Executors of the Estate of
Edwin B. Hendrie, Deceased.

By MORRISON SHAFROTH,
*Attorney for Petitioners.*

In the

# Supreme Court of the United States

OCTOBER TERM, 1937.

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No.....

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THE COLORADO NATIONAL BANK OF DENVER and GERTRUDE HENDRIE GRANT, Executors of the Estate of Edwin B. Hendrie, Deceased, PETITIONERS,

*v.*

COMMISSIONER OF INTERNAL REVENUE.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### THE OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit in this case is reported in *Commissioner of Internal Revenue v. The Colorado National Bank et al.*, No. 1566, 95 F. (2d) 160 (Advance Sheets). This decision, rendered on January 31, 1938, rehearing denied April 4, 1938, is found in the Record on page 53. The memorandum opinion of the Board of Tax Appeals (not reported), entered September 19, 1936, is found at page 28 of the Record.

### II.

### JURISDICTION.

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of Feb-

ruary 13, 1925. The judgment of the United States Circuit Court of Appeals was entered on January 31, 1938. Petition for rehearing was filed on March 1, 1938, and denied on April 4, 1938.

## III.

### STATEMENT OF THE CASE.

A statement of the case is contained in the petition for a writ of certiorari at page 2.

## IV.

### SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In reversing the decision of the Board of Tax Appeals and giving judgment for the Commissioner.

(2) In holding that decedent's irrevocable transfer effected by the declaration of trust dated January 7, 1927, was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

(3) In holding that this irrevocable gift in trust without reservation of income to donor was in contemplation of death as a matter of law under said statute because it withheld from the beneficiaries the actual enjoyment thereof until after donor's death, thereby disclosing an intent to provide for them after his death.

(4) In holding that though the trust was for the purpose of preserving a part of donor's property from the dangers of his future stock market speculation, yet the desire to preserve it was in order to provide with it for his descendants after his death, and that it was therefore as a matter of law in contemplation of death under the said statute.

(5) In overturning the determination of the Board of Tax Appeals that the gift was not in contemplation of death and in holding that such determination was without substantial evidence to support it.

## V.

### ARGUMENT.

An analysis of the Court's opinion shows that there is no question in this case of any attempt to evade the estate tax; no claim of thought of death immediately or in the near future; no claim of disease or ill health at the time of the gift; and finally neither a two-year presumption nor a finding of the Board of Tax Appeals to aid the tax. On the contrary the Court concedes commendable motive, good health, anticipation of future business activity, lack of thought of death immediately or in the near future, continued life for more than five years after the gift, and a finding of the Board of Tax Appeals that the gift was not in contemplation of death.

Furthermore, it finds that the motive for the gift in trust was the desire to preserve a part of donor's property from the dangers of his future activities in the stock market—"in order to make certain that it would be used for his daughter and her children after his death."* The purpose obviously could not have been attained by a testamentary disposition. It required segregation of the prop-

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* "* * * The trust was not designed to make provision for the beneficiaries during his life. None of the property or the increment thereto was to reach them until after his death. Neither was it designed to enable him to engage in speculation. He could have done that unfettered and unrestrained without the establishment of the trust. But in its absence the property transferred would have been subject to the hazards of speculation. It would have been within reach of creditors if he lost all. The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for

erty then, not at death, if he was to avoid the effects of his own future speculations.

From this ultimate purpose, however, one of the most common of human motives, it not only infers testamentary disposition and so contemplation of death, but holds that no other inference is possible and that the contrary finding of the Board of Tax Appeals is without substantial evidence to support it.

The same position was taken by the government before the Board of Tax Appeals** and was rejected by it as contrary to the ruling of this Court in *Shukert v. Allen*, 273 U. S. 545; *McCormick v. Burnet*, 283 U. S. 784; *St. Louis Union Trust Co. v. Becker*, 76 F. (2d) 851; affirmed 296 U. S. 48; *Reinecke v. Northern Trust Co.*, 278 U. S. 339; *United States v. Wells*, 283 U. S. 102; and other cases.

In cases of the type here involved—trusts in which the income is withheld from the beneficiaries until donor's death—the Government has usually taken the position that they fall under the second of two statutory categories of gifts (1) in contemplation of death or (2) intended to take

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them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that certainty was gratified by the transfer. The purpose was a commendable one, but the generating motive for a transfer made in such circumstance is associated with death." (From Opinion of the Circuit Court of Appeals, R. p. 58.)

** * * The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death." (From Opinion of Board of Tax Appeals, R. p. 30.)

effect in possession or enjoyment at or after death. That was the original position taken by the Commissioner in the pending matter (R. p. 18), but later abandoned. If the Court's ruling in our case, however, is correct, it would seem to follow that most, if not all, trusts intended to take effect in actual enjoyment after death, whether or not within the technical statutory meaning of the possession and enjoyment provision, are in contemplation of death. The motive to provide for the beneficiaries after donor's death is by the very terms of the instruments present in all such cases. That is exactly what all such trust instruments do.

Futile and most costly to the revenue would appear the Government's long and unsuccessful struggle, commencing with *Reinecke v. Northern Trust Co.*, 278 U. S. 339, and concluding with *McCormick v. Burnet*, 283 U. S. 784, and sister cases, to establish that such gifts were taxable under the possession and enjoyment clause, if the simple assertion of liability under the contemplation of death clause would have brought success. Moreover, it would seem unlikely that this Court with the statute and all of the necessary facts before it would repeatedly in that line of cases reject taxability without comment that on the face of the record taxability was patent on the ground of contemplation of death.

The fact is that in each of those cases the Court had before it both provisions appearing in the same sentence of the statute. It had before it the argument that the gift was testamentary because of the postponed enjoyment, and it passed sometimes expressly and sometimes impliedly on the very question involved here.

THE COURT'S RULING AS TO THE CONCLUSIVE EFFECT OF POSTPONED ENJOYMENT UNTIL AFTER DONOR'S DEATH IS CONTRARY TO SHUKERT v. ALLEN, 273 U. S. 545, AND OTHER CASES.

The facts as set forth in the District Court (300 F. 754) and in the decision of the Circuit Court of Appeals (6 F. (2d) 551) show that on May 5, 1921, donor created for the benefit of his three children a trust fund of about two hundred thousand dollars to accumulate for a period of thirty years, subject to slight diminution in case of remote contingencies. He was fifty-seven years of age when the trust was made and died four months later. The District Court found from the donor's own statement that:

> "• • • It is a trust created by Mr. Shukert, which he intended to take effect in possession and enjoyment long after he should have passed away; after it might be that the large fortune which he had accumulated had been lost through misfortune, or extravagance, or waste, or things that might happen after that. His care went clear to the time when 30 years should have gone by. His care for his children reached clear to that point, and he intended at that time it should take effect."

The gift was held taxable under the second clause and the ruling was affirmed by the Circuit Court of Appeals (6 F. (2d) 551).

When the case came to the Supreme Court of the United States, *the Government argued* (see outline of Government's argument, 71 L. Ed. 766) that:

> "The intention of Congress, as well as the letter of the law, requires that there shall be included in a decedent's gross estate, the value of all property with respect to which he has made a transfer or created a trust which in substance and effect, though not in form, is testamentary. The trust in question is in substance and effect testamentary, because it

postpones the ordinary incidents of ownership until the donor's death, and in fact is, and was intended to be, a postmortem disposition of the property."

MR. JUSTICE HOLMES delivered the unanimous opinion of the United States Supreme Court reversing the lower court and holding the trust not taxable. He discussed its taxability under the contemplation of death clause as well as under the possession and enjoyment clause, though the latter was the point stressed by the Government, and the Court. He said (273 U. S. at 547):

"* * * It seems plain from the little evidence that was put in that the testator was not acting in contemplation of death as a motive for his act, or otherwise, except in the sense that he was creating a fund intended to secure his children from want in their old age, whoever might dissipate the considerable property that he retained and left at his death; and that, being fifty-six years old, if he thought about it, he would have contemplated the possibility or probability of his being dead before the emergency might arise. Of course, it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute.

* * * * * *

"* * * But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death."

On January 2, 1929, the United States Supreme Court in the case of *Reinecke v. Northern Trust Co.*, 278 U. S. 339, passed on the taxability under the Revenue Act of

1921* of seven trusts created by decedent during his lifetime. By reason of powers of revocation contained in two of the trusts, it was held that those transfers were not complete until decedent's death and on that ground were taxable. In a third, life incomes were given the wife and children with distribution of corpus after donor's death.

> "The other four 1919 trusts were severally made for the benefit of a child of the settlor. As drawn, they provided for the accumulation of the whole income until the period of distribution of the corpus, after the death of the settlor, except so much thereof as the settlor might, from time to time, direct to be paid to the beneficiary named. By amendments made on June 28, 1921, in the manner provided in the trust instruments, the beneficiary under each was to be paid the income." (From Opinion of Circuit Court of Appeals, 24 F. (2d) 91, 92.)

Donor died in 1922.

Here again the Government relied on the possession and enjoyment theory. The Supreme Court, however, had before it trust instruments providing for donor's children after his death. The intent was clear on their face. Under the Court of Appeal's ruling in our case this conclusively showed contemplation of death. Yet, referring to these the Supreme Court said (p. 347):

> "* * * as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to tax."

It seems reasonable to infer that the Court did not consider the intent to provide for his children after his death as shown by the trust instrument to be equivalent to testamentary disposition or contemplation of death.

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*Identical with Revenue Act of 1926 in this contemplation of death provision.

The Court made no distinction between the trust in which the life income was given to the beneficiaries and the four in which it was to accumulate. (The amendment of the four trusts in 1921 probably could not alter the intent of the gift of 1919.) Logically there is no distinction so far as this question is concerned. In each, ultimate provision is made and intended to be made for the beneficiaries after donor's death. And if that intent is to be construed as testamentary and in contemplation of death, then all such gifts are taxable whether the income is to accumulate or to be distributed.

MR. JUSTICE STONE speaking for the Court said (p. 347):

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in the present statute.
>
> "* * * The two sections read together indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment."

In *May v. Heiner*, 281 U. S. 238, donor transferred to trustees certain property, the income to be paid to her husband for life, then to her for life "and after her decease all property in said trust, in whatsoever shape or form

it may be, shall, after the expenses of the trust have been deducted or paid, be distributed equally among" her four children, their distributees, or appointees. Words could not make clearer her intent to provide for her children after her death.

Again the Government stressed the second statutory ground, apparently not conceiving success possible on the contemplation of death theory. But again the Supreme Court noted the presence of that problem and said (p. 243):

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent."

It then quotes with approval from *Reinecke v. Northern Trust Co., supra,* the passage which we have quoted from that case.

It seems obvious that a case where the income is reserved to donor for life with remainder to her children is much nearer a testamentary disposition than one in which the donor reserves nothing to himself and the income accumulates for the ultimate beneficiaries. Yet the Government repeatedly pressed such cases on the possession and enjoyment theory and when rebuffed in those attempts to tax, both in this and other cases, went to Congress and obtained the Joint Resolution of March 3, 1931.* If the intent to provide for the objects of donor's bounty after his death made the gift testamentary and taxable as in contemplation of death, then the Resolution was wholly unnecessary. It is significant that it sought only to make taxable a transfer under which the decedent reserved the income to himself for life. The fact that it selected that single type of case and did not mention those other cases where the donor reserves nothing

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*See Appendix, page 29.

for himself, but lets the income either accumulate or be paid to the beneficiaries, is evidence that such cases were not intended to be brought within the reach of the statute.

In *Becker v. St. Louis Union Trust Company and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased*, 296 U. S. 48 (decided November 11, 1935), the contemplation of death issue was directly before the Court. Decedent, a man seventy-seven years old, in good health and active in business, executed declarations of trust in favor of each of his four children. The instruments provided for the payment of $300.00 a month out of the income to each child with power on the donor's part to increase or decrease that amount in his discretion; the balance of the income to accumulate and be added to the principal; and the entire trust property to go immediately and absolutely to the child on donor's death. He died seven years later. The value of the trust at that time was $994,195. The district court found that the gift was both in contemplation of death and intended to take effect in possession and enjoyment after death. The Circuit Court of Appeals for the Eighth Circuit reversed the case (76 F. (2d) 851) and found that the purpose of the gift was to make the children independent and to avoid income taxes. The Supreme Court (296 U. S. 48, 52), in holding the gift not taxable, said:

> "We are unable to find anything in the record which conflicts with the statement of the Court below that evidence that decedent was in any way influenced by the thought of death was wholly lacking."

Yet, there was the trust deed with the definite ultimate object that his children should have the property after his death. True, there were other motives—to save income tax and to make his children independent—and so in our case there was the motive to save part of his fortune from loss in the stock market.

Other cases to the same general effect are: *McCormick v. Burnet*, 283 U. S. 784; *Burnet v. Northern Trust Co.*, 283 U. S. 782; *Morseman v. Burnet*, 283 U. S. 783; *White v. Poor*, 296 U. S. 98; *Nichols v. Coolidge*, 274 U. S. 531; *Commissioner of Internal Revenue v. McCormick*, 43 F. (2d) 377; *Welch v. Hassett*, 90 F. (2d) 833 (Circuit Court of Appeals, First Circuit. Affirmed in Supreme Court on a different point. February 28, 1938); *Commissioner of Internal Revenue v. Nevin*, 47 F. (2d) 478 (Circuit Court of Appeals, Third Circuit); *Reinecke v. Northern Trust Co.*, 24 F. (2d) 91 (Circuit Court of Appeals, Seventh Circuit); *Tait v. Safe Deposit & Trust Co.*, 74 F. (2d) 851 (Circuit Court of Appeals, Fourth Circuit); *McCaughn v. Carnill*, 43 F. (2d) 69 (Circuit Court of Appeals, Third Circuit); *Bullard v. Commissioner*, 90 F. (2d) 144 (Circuit Court of Appeals, Seventh Circuit. Reversed on another point. February 28, 1938).

THE RULING THAT THE TRUST WAS CREATED IN CONTEMPLATION OF DEATH IS CONTRARY TO UNITED STATES v. WELLS, 283 U. S. 102.

The Wells case did not involve a trust, but an outright gift made within eight months of death and so presumably in contemplation of death. Donor was seventy-three years old at date of death. Despite the presumption, the poor state of donor's health and his direction that the gifts be treated as advancements, the Court of Claims, where the case originated, found that he was carrying out a policy of liberal gifts to his children during his lifetime and in effect that the gifts were not in contemplation of death. The Supreme Court treated this finding as binding and sustained the lower court. On page 115 the Court uses this language:

> "The phrase 'in contemplation of death' previously found in state statutes, was first used by the Congress in the Revenue Act of (September 8) 1916 imposing an estate tax. It was coupled with

a clause creating a statutory presumption in case of gifts within two years before death * * *. While the interpretation of the phrase has not been uniform; there has been agreement upon certain fundamental considerations. It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern giving rise to a definite motive."

The Court in a note then cites Article 23 of Regulas 37 under the Revenue Act of 1918, containing the owing:

"Art. 23. *Nature of Transfer.*—The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. The cause which induces such bodily or mental conditions is immaterial; and it is not necessary that the decedent be in the immediate expectation of death. * * * All facts relating to the transfer should be stated, including the motive therefor, the decedent's state of health, and his anticipation of death."

Is it not significant that there is no claim in these my later regulations that it makes any difference, so as the question of contemplation of death is concerned, ther the transfer is immediate to the beneficiary or in t until after the donor's death? If that distinction ted, it would be all-important in every trust case where me was withheld from the beneficiary until donor's h and would have made taxable innumerable trust that remained untaxed.

In our case there was no definite concern connected with death. The definite concern was clearly connected with the stock market. Contemplation of the danger of his speculations, not contemplation of death, was the direct cause of the transfer. No testamentary disposition could have accomplished the desired result. What might therefore be called the proximate cause was fear of the market. The remote cause is immaterial.

Moreover, the fact that the donor also desired to provide for his descendants after his death was a motive that is common to all men. One preserves his property from loss for the same reason that he accumulates his property during life—not primarily or ultimately for himself, but for his wife and children. This is true of men of every age and every state of health. Yet, the Circuit Court of Appeals has held that this motive itself is contemplation of death. It has confused contemplation of death with the expectation of death common to all.

The Supreme Court in the Wells case, referring to the findings of the Court of Claims, says:

> "In the view of the Court as thus explicitly stated not only was there no fear at the time of the transfers that death was near at hand, but the motive for the transfers brought them within the category of those which, as described by the government, are intended by the donor 'to accomplish some purpose desirable to him if he continues to live.'"

**THE COURT'S DECISION IS IN CONFLICT WITH COMMISSIONER OF INTERNAL REVENUE v. McCORMICK, ET AL., 42 F. (2d) 277 (CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT).**

In this case, Mrs. McCormick, then eighty-three years of age, created a trust of some seven million dollars. The trust provided that the income should cumulate during the grantor's life with minor reservations. After her death

the income was to go to her three children, share and share alike, the principal to be distributed upon the death of the last survivor of said children as each of the children might by will direct. The donor died on July 5, 1923, a few days less than five years after the execution of the trust. The transfer amounted to about one-half of her property.

Considerable evidence was taken as to the state of her health at the time of the execution of the trust. The evidence indicated that she was in good health for one of her age, that she was interested in charities, that she was interested in making certain changes in her home and was interested in the future. No other evidence as to motive than the evidence of the agreement itself and of the general state of her health and interests is referred to in the Board of Tax Appeals' opinion. The Board found that the gift was neither made in contemplation of death nor intended to take effect in possession or enjoyment at or after death.

On September 20, 1930, the Circuit Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue v. McCormick*, 43 F. (2d) 277, reversed the ruling of the Board of Tax Appeals (*McCormick, et al. v. Commissioner of Internal Revenue*, 13 B. T. A. 423) on the ground that the gift was one intended to take effect in possession or enjoyment at or after death, but sustained its ruling that the gift was not in contemplation of death. The Court said:

> "The Board found that the trust was not executed in contemplation of death. There is some evidence tending to support this finding. Petitioner does not challenge its soundness."

The Supreme Court (283 U. S. 783) reversed the Court of Appeals in its holding that the transfer was one intended to take effect in possession or enjoyment at or

after death and reaffirmed the ruling it had made in *May v. Heiner, supra.*

This case is in many respects as identical with the case now pending before the Court as two cases are often found. Mrs. McCormick was eighty-three years old when the trust was made. Mr. Hendrie was eighty. Both were in good health. Mrs. McCormick was interested in her charities and a new house. Mr. Hendrie was interested in business, golf and the stock market. His intent to gamble in the market gave him one definite and powerful incentive for the creation of his trust which Mrs. McCormick lacked; namely, the desire to preserve a part of his fortune if the stock market went against him. Mrs. McCormick died *within* five years. Mr. Hendrie died *after* five years. The trusts in each case provided for the accumulation of the income and for distribution to their children after their deaths. The decisions seem to us in conflict.

**THE RULING OF THE CIRCUIT COURT OF APPEALS OVERTURNING THE BOARD OF TAX APPEALS' FACT DETERMINATION IS BEYOND ITS POWER AND IN CONFLICT WITH HULBURD V. COMMISSIONER OF INTERNAL REVENUE, 288 U. S. 209, AND OTHER CASES.**

The Court in its opinion recognizes the settled rule that findings of fact by the Board of Tax Appeals will not be disturbed on review, if supported by substantial evidence. We have pointed out that the undisputed evidence presented to the Board showed the sound physical and mental condition of the donor, his interest and activities in life, his intent to speculate in the stock market, his actual speculations for five and one-half years after the gift, his fear of losing his fortune, his desire to segregate a part of his property from the vicissitudes of the market, and his attainment of that object by the creation of this gift in trust—providing for his daughter after his

death. The evidence goes to the very points the Court and regulations have stressed as vital in these cases.

This Court, however, from the single fact that the instrument provides an income for his daughter after his death and was intended so to do, infers, contrary to the finding of the Board, that contemplation of death was the moving cause of the gift. It is difficult for us to see how this inference is possible from the evidence. If it is possible, it certainly is not the only inference possible. In the face of the finding of the Board on this question of fact, the Court had no power to choose between conflicting inferences.

In *Hulburd v. Commissioner of Internal Revenue*, 296 U. S. 300, at 306, it is said:

> "• • • The same restraints upon jurisdiction were binding upon the Court of Appeals in reviewing the action of the Board, and binding with greater emphasis, for the Court was without power to choose between conflicting inferences unless only one was possible, or to try the case de novo. Helvering v. Rankin, 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732."

In *McCaughn v. Real Estate Land, Title & Trust Co.*, 297 U. S. 606, the District Court, in which the suit originated, found (7 Fed. Supp. 742) that plaintiff had failed to sustain the burden of proof arising from the statutory presumption as to gifts within two years of death and that the gift therefore was taxable as in contemplation of death. The Court of Appeals (79 F. (2d) 606) reversed the case, holding that in the light of the Wells case, supra, the gift was clearly not in contemplation of death. The Supreme Court of the United States in holding the Court of Appeals without power to overturn the ruling of the lower court used this significant language:

> "• • • Where a general verdict is found by the trial court, it has the same effect as the verdict

of a jury. The Appellate Court cannot pass upon the weight of evidence." (Citing many cases.)

"Here, plaintiffs' exceptions to the conclusions of law of the trial court, and to the refusal of the court to reach other conclusions as requested, raised no question save the one of law, whether the court's verdict was wholly without evidence to sustain it. That question does not appear to be substantial. The ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive. The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings."

In *Elmhurst Cemetery Company of Joliet v. Commissioner of Internal Revenue*, 300 U. S. 37, the Supreme Court said (p. 40):

"* * * It is the function of the Board to weigh the evidence and declare the result."

In *Neal v. Commissioner of Internal Revenue*, 53 F. (2d) 806 (Circuit Court of Appeals, Eighth Circuit), the Court says (p. 807):

"Were these gifts made 'in contemplation of death,' as that expression is used in the statute * * *?" (Citing cases.) "This is purely a question of fact. The fact sought is the controlling motive in the mind of Neal in making these gifts * * * and we cannot disturb the determination of the Board thereon if there is substantial evidence to support such determination."

In *Commissioner of Internal Revenue v. Sharp et al.*, 91 F. (2d) 804 (Circuit Court of Appeals, Third Circuit), gifts in trust were involved. The Board of Tax Appeals found (30 B. T. A. 532, at 536):

"* * * He was devoted to his family and wished to provide for them in a way to secure them against any possible disposition which he might develop in old age to hazard his fortune in business deals. * * * His desire was to place funds beyond his own control which would insure the financial protection of his wife and children. This was the primary object of the creation of the trusts and of making the transfers, as he expressed himself to the lawyer who prepared the trust instrument for him."

This case was reopened before the Board to permit the introduction of the trust agreements (33 B. T. A. 290). The Circuit Court of Appeals sustained the finding of the Board that the gift was not in contemplation of death and was not taxable.

## CONCLUSION.

For the foregoing reasons it is submitted that a writ of *certiorari* should issue to the Circuit Court of Appeals for the Tenth Circuit.

MORRISON SHAFROTH,
Denver, Colorado,
*Attorney for Petitioners.*

*Of Counsel:*

W. W. GRANT,
HENRY W. TOLL,
Denver, Colorado.

APPENDIX.

The Government's claim is based on Section 302 (c) of the Revenue Act of (February 26) 1926, as amended, 26 U. S. C. A., Sec. 411 (c); 44 Stat. 70; March 3, 1931, c. 454, 46 Stat. 1516; June 6, 1932, c. 209, Sec. 803 (a), 47 Stat. 279:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Joint Resolution of March 3, 1931 (Public No. 131—Seventy-first Congress):

"RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the first sentence of subdivision (c) of Section 302 of the Revenue Act of 1926 is amended to read as follows:

"'To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom: except in case of a bona fide sale for an adequate and full consideration in money or money's worth.'"

In the

Supreme Court of the United States

October Term, 1916.

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The Colorado National Bank of Denver and Solomon Hyman Green, Executors of the Estate of Alfred E. Hendrie, Deceased, Petitioners,

v.

Commissioner of Internal Revenue.

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Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

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# BRIEF FOR PETITIONERS.

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Denver, Colorado,
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*Counsel:*

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Henry W. Toll,
Ralph Rogers,
Denver, Colorado.



Smith-Brooks Printing Co., Lawrence and 15th, Denver, Colo.

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No. 30

In the

# Supreme Court of the United States

October Term, 1938.

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The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Petitioners,

*v.*

Commissioner of Internal Revenue.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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## BRIEF FOR PETITIONERS.

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### I.

#### OPINION BELOW.

The memorandum opinion by the Board of Tax Appeals (not reported) appears at page 26 of the Record. The opinion of the Circuit Court of Appeals is reported in 95 F. (2d) 160, and is found at page 49 of the Record.

### II.

#### JURISDICTION.

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the act of Feb-

ruary 13, 1925. The decision of the Board of Tax Appeals in favor of the taxpayer was entered November 9, 1936 (R. 28). The Commissioner petitioned for review January 30, 1937 (R. 29).

The judgment of the Circuit Court of Appeals was entered on January 31, 1938 (R. 55). Petition for rehearing was filed on March 1, 1938 (R. 56) and denied on April 4, 1938 (R. 58). The petition for a writ of certiorari was filed on May 2, 1938, and was granted May 31, 1938 (R. 59).

## III.

### STATUTE INVOLVED.

The statute involved is set out in the Appendix (infra, p. 49).

## IV.

### STATEMENT OF CASE.

Five and one-half years before his death, Edwin B. Hendrie created on January 7, 1927, an irrevocable trust (Exhibit B, R. 9) of approximately $827,000.00, the income to accumulate and to be added to the principal during his life, and on his death the income to be paid his daughter with remainder over to her children. He died on July 15, 1932, at the age of eighty-five years and six months (R. 33).

Petitioners are executors of his estate and on the federal estate tax return reported a gross estate of $938,006.68 (R. 34). The trust assets were not included. The Commissioner of Internal Revenue in a deficiency notice, September 13, 1934, added the amount of $1,034,074.22, representing the value at Mr. Hendrie's death of the property transferred to the trust (R. 34) and asserted a deficiency tax in the amount of $188,106.28 (R. 34).

Petitioners appealed to the Board of Tax Appeals, December 8, 1934 (R. 2), and in a stipulation of facts filed May 19, 1936, all of the foregoing facts were stipulated. In addition verified statements of various witnesses (physi-

cian, lawyer and son-in-law) were admitted in evidence by stipulation, in lieu of depositions (R. 37, 39, 42).

The undisputed testimony of decedent's physician (R. 37), his son-in-law (R. 42) and his lawyer (R. 39) was to the effect that decedent until shortly before his death and at and long after the execution of the trust was in good health, had had no serious illness, was without symptom of disease (R. 39), was active in business (R. 42), exercised regularly, taking setting-up exercises and walks, played golf, took annual trips alone to California and at the time of the execution of the trust was contemplating speculation in the stock market and thereafter did so speculate on a considerable scale (R. 44).

The reason he gave to the trust officer for the creation of the trust was (R. 41) the thought that

> "after he made this trust agreement he would then have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish and that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in said trust deed and thereby putting it entirely beyond his own power to otherwise dispose of the same contrary to the provisions of the said trust deed and to remove it from the vicissitudes of his speculations. Mr. Hendrie expressed doubt as to the stability of the market and expressed a desire to 'play on the market' more actively and in a more speculative way than in the past. Mr. Hendrie often spoke of his intention of thus occupying himself for the rest of his life, and in giving less time to the Hendrie and Bolthoff business."

> "Mr. Hendrie at all times indicated that his thought was how to word the trust agreement so that, whatever might happen to him financially in the future and in regard to his remaining fortune, the

corpus of the trust would in nowise be jeopardized thereby, or prevent the disposition of said corpus in the manner provided for in said trust deed." (R. 42)

At his death the value of the trust was greater than the value of his estate (R. 15, 17).

There was no discussion of avoidance of death or inheritance taxes or of the disposition of the balance of his estate, nor is there anywhere in the Record any evidence of a desire to avoid the estate tax or any discussion of it, nor was there any discussion of the disposition of the rest of his fortune (R. 42). His will (R. 44) had been drawn some two years before the creation of the trust. It was never changed.

## V.

### RULING OF BOARD OF TAX APPEALS AND OF THE CIRCUIT COURT OF APPEALS.

The Board of Tax Appeals, in a memorandum opinion entered September 19, 1936, not reported, but appearing (R. 26), found for the taxpayer (petitioners), holding the gift was not in contemplation of death. It said (R. 28):

"* * * Their point is that he made the transfer so that he would be free to speculate on the stock market for the rest of his life without fear that loss of his fortune would leave nothing for his daughter and her children. They point out that the donor made a complete gift and retained no possession or enjoyment to himself. They cite and rely upon Shukert v. Allen, 273 U. S. 545; McCormick v. Burnet, 283 U. S. 784; St. Louis Union Trust Co. v. Becker, 76 Fed. (2d) 851, affirmed 296 U. S. 48; Reinecke v. Northern Trust Co., 278 U. S. 339 (fol. 30); Klein v. United States, 283 U. S. 231, among others. The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were

to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death. We think the transfer was not made in contemplation of death within the meaning of the statute as explained in United States v. Wells, 283 U. S. 102. * * * "

The Circuit Court of Appeals (Judge Lewis dissenting) reversed the Board (R. 49), 96 F. (2d) 160. It held that:

"* * * The trust was not designed to make provision for the beneficiaries during his life. None of the property or the increment thereto was to reach them until after his death. Neither was it designed to enable him to engage in speculation. He could have done that unfettered and unrestrained without the establishment of the trust. But in its absence the property transferred would have been subject to the hazards of speculation. It would have been within reach of creditors if he lost all. The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that certainty was gratified by the transfer. The purpose was a commendable one, but the generating motive for a transfer made in such circumstances is associated with death. It follows that the transfer (fol. 59) was made in contemplation of death within

the meaning of the statute, though decedent was in sound health of body and mind and did not entertain thought of death immediately or in the near future.

* * *

"It is settled law that a finding of fact made by the Board of Tax Appeals will not be disturbed on review if it is supported by substantial evidence. * * * We fail to find any substantial evidence that the transfer under consideration was not made in contemplation of death within the meaning of the statute." (R. 55.)

## VI.

### SPECIFICATION OF ERRORS RELIED ON.

The Circuit Court of Appeals erred:

(1) In reversing the decision of the Board of Tax Appeals and giving judgment for the Commissioner.

(2) In holding that decedent's irrevocable transfer effected by the declaration of trust dated January 7, 1927, was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

(3) In holding that this irrevocable gift in trust without reservation of income to donor was in contemplation of death as a matter of law under said statute because it withheld from the beneficiaries the actual enjoyment thereof until after donor's death, thereby disclosing an intent to provide for them after his death.

(4) In holding that though the trust was for the purpose of preserving a part of donor's property from the dangers of his future stock market speculation, yet the desire to preserve it was in order to provide with it for his descendants after his death, and that it was therefore as a matter of law in contemplation of death under the said statute.

(5) In overturning the determination of the Board of Tax Appeals that the gift was not in contemplation of death and in holding that such determination was without substantial evidence to support it.

## VII.

### SUMMARY OF ARGUMENT.

Contemplation of death is a question of fact. Evidence on all the important points and circumstances stressed by the courts and the Regulations as important in its determination was presented to the Board of Tax Appeals. The Board found that the transfer was not made in contemplation of death. The evidence was convincing in support of that determination. The Circuit Court of Appeals was without power to determine that question of fact for itself.

Both the court and the Government in effect admit that the immediate or proximate cause of the transfer was fear of losing the property in the stock market speculation in which donor was about to plunge. They rely on the single fact that the gift provided for his beneficiaries after donor's death and was intended so to do. Intent to provide for one's beneficiaries after death is claimed to be the equivalent of contemplation of death regardless of all other circumstances and as a matter of law.

In this respect gifts in trust in which income is to accumulate for the beneficiary during the donor's life, as in this case, and those in which he reserves a life interest to himself are alike. They both evidence an intent to provide to the extent of the gift for the beneficiaries after donor's death. This court has many times repudiated the contention that such fact makes the gift taxable.

Moreover, Congress, in the Joint Resolution of March 3, 1931, and in the Revenue Act of 1932, specifically selected only one class of such gifts for taxation, namely, those

reserving a life interest to the donor, himself, clearly excluding by implication those without such reservation.

It is also clear that gifts which are not intended to take effect in possession and enjoyment till after donor's death are in the same way intended to provide for the beneficiaries after donor's death. Yet, Congress in order to reach such gifts felt it necessary to enact the possession and enjoyment provision of the statute. The most elementary doctrines of statutory construction indicate that "contemplation of death" did not cover such cases.

It is self-evident that life insurance is intended to provide for the beneficiary after donor's death. Yet, the Treasury has continuously recognized that life insurance may or may not be assigned or a beneficiary named in contemplation of death, depending on health, anticipation of death and other factors wholly apart from the intent to provide for beneficiaries after donor's death.

In the long series of Treasury Regulations issued under the various revenue laws, it has never once been claimed that the intent to provide for beneficiaries after donor's death even constituted evidence of contemplation of death, much less that it was conclusive thereof.

In the face of all this judicial and administrative interpretation, Congress has repeatedly reenacted the contemplation of death provision without change. It has thereby adopted such interpretation as a part of the statute.

The contemplation of death provision was aimed at those who in expectancy of death transferred their property prior thereto and thus evaded the tax. Up to Regulations 80 the Regulations have so defined it almost from the start. They specifically point out that it does not refer to the expectation of death common to all, but to a special expectation of death arising from a bodily or mental condition. This administrative definition has been ap

proved by repeated congressional enactments of the law and by this court. It is too late for the Department or the courts to make a new and different definition.

One's expectation of death is ascertained primarily by a determination of his physical condition. For that reason the evidence in contemplation of death cases has almost invariably revolved around the health of the donor, his length of life after the gift, his general outlook on life and his plans, if any, for future activity. If his expectation of death is only that common to all, his gift is not within the statute. In contemplation of death cases then, the object of the court really is to determine whether donor had some different expectation of death than that common to all and whether that expectation of death was the motive for the gift.

If intent to provide for one's children after death is conclusive of contemplation of death, as the lower court says, then it must be that such intent does not exist in men with only the ordinary expectation of death. But the desire to provide for one's children after death is obviously common to all whatever their expectation of death and whatever their health and age. By many, such provision is deemed a moral obligation.* Evidence of that fact, if any is needed, may be found in the billions of dol-

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*In *Burnet v. Wells*, 289 U. S. 670, Mr. Justice Cardozo speaking for the court said at p. 681:

> "Insurance for dependents is today in the thought of many a pressing social duty. Even if not a duty, it is a common item in the family budget, kept up very often at the cost of painful sacrifice, and abandoned only under dire compulsion. It will be a vain effort at persuasion to argue to the average man that a trust created by a father to pay premiums on life policies for the use of sons and daughters is not a benefit to the one who will have to pay the premiums if the policies are not to lapse. Only

lars of life insurance taken out by young and old alike, all presumably in good health and not with any other expectation of death than is common to all mankind and without any intent to evade the estate tax.

Moreover, anyone with even ordinary sense about to risk his fortune in the stock market will set aside a part to protect his family as did Mr. Hendrie. The gift was clearly in contemplation of the dangers of speculation and not in contemplation of death.

By defining a testamentary disposition as "one intended to provide for the objects of testator's bounty at death" (p. 7, Government's Brief opposing certiorari), the Government arrives at the conclusion that any gift which accomplishes that purpose is a substitute therefor and is therefore in contemplation of death. Such conclusion is not only barred by the long judicial and legislative interpretation hereinbefore set forth, but is clearly erroneous.

The essential characteristic of a testamentary gift which distinguishes it from an inter vivos gift is that in the former case no property right is parted with and none obtained till testator's death. Until that date the will is a nullity. By an inter vivos gift the donor parts with property rights when the gift is made.

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by closing our minds to common modes of thought, to everyday realities, shall we find it in our power to form another judgment. * * *

"* * * The relation between the parties, the tendency of the transfer to give relief from obligations that are recognized as binding by normal men and women, will be facts to be considered. * * * A particular expense which for millions of men and women has become a fixed charge, as it doubtless was for Wells, an expense which would have to be continued if he was to preserve a contract right, was to be met in a particular way. * * *"

To say that an inter vivos gift is taxable as a substitute for a testamentary gift because of the person to whom or the manner in which it gives the property, involves a complete confusion of thought. It disregards the statute and depends upon the exaggeration of minor incidentals into essential characteristics.

## VIII.

### ARGUMENT.

An analysis of the lower court's opinion shows that there is no question in this case of any attempt to evade the estate tax, no claim of thought of death immediately or in the near future, no claim of disease or ill health at the time of the gift and finally neither a two year presumption nor a finding of the Board of Tax Appeals to aid the tax. On the contrary, the court concedes that the evidence shows commendable motive, good health, anticipation of future business activity, particularly in the stock market, lack of thought of death immediately or in the near future, continued life for more than five years after the gift, and the determination by the Board of Tax Appeals that the gift was not in contemplation of death.

Furthermore, it finds that the motive for the transfer in trust was the desire to preserve a part of donor's property from the dangers of his future activities in the stock market "in order to make certain that it would be used for his daughter and her children after his death." This purpose obviously could not have been achieved by a testamentary disposition. It required segregation of the property then, not at death, if he was to avoid the effects of his own future speculations.

The evidence goes to the very points that the courts and the Treasury Regulations have for years stressed as vital in these cases. The very first sentence of the Treas-

ury Regulations* for many years read as follows (Art. 16, Regulations 70, 1929 Edition):

> "The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death."

Over and over again has this thought been reiterated in the Regulations and in the cases. The Regulations continue:

> "* * * A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem the proper objects of their bounty. * * *"

It is the expectation of death arising out of some special bodily or mental condition that must be found to justify the tax. It is not the manner of the disposition of the property or the time of the enjoyment. They are not even mentioned in connection with contemplation of death.

That intent to provide for one's beneficiaries after death is not of importance as evidencing any expectancy of death other than is common to all, is obvious from an examination of life insurance statistics. In Dingman on Insurability a table is given at p. 113 showing the ages of people taking out life insurance designed to provide for their beneficiaries after death.

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*See Regulations 37, 1921 Edition, Art. 23; Regulations 63, 1922 Edition, Art. 16; Regulations 70, 1929 Edition, Art. 16.

It shows that 14% of the policies are taken out by those below 25 years of age and 63% of those below forty. The age grouping based on a unit of 100,000 buyers shows that within that range the policies are purchased as follows:

| | |
|---|---|
| 4,000 | at age 15-20 |
| 10,000 | 20-25 |
| 15,000 | 25-30 |
| 16,000 | 30-35 |
| 18,000 | 35-40 |

Surely the millions of healthy people who take out such insurance cannot because of its nature and intent be said to be acting in any expectation of death other than is common to all.

Nor has the fact that a man had life insurance and was regularly paying premiums thereon, thus periodically reaffirming his intent to provide for his beneficiaries after death, ever been advanced as evidence that any particular gift he made during that time was with a special expectancy of death or in contemplation of death. Yet, if the Government's position is right, it would be potent evidence to sustain the tax on such gifts.

The Treasury Regulations continue:

"Facts relating to the transfer should be stated, including the motive therefor, the decedent's state of health and his anticipation of death." Obviously the important questions are whether the man was in good health, whether he died soon after he made the gift, whether he continued his activities in life or simply laid down and waited to die, whether there was anything connected with his future activities that might be a reason for the transfer or whether it was just a scheme to evade the estate tax. If the nature of the gift involving postponed enjoyment till donor's death constituted any evidence at all of contemplation or expectation of death different from that of the ordinary

person, which is extremely doubtful, it certainly did not constitute conclusive evidence thereof. Take, for example, the evidence and discussion in *United States v. Wells*, 283 U. S. 102. Mr. Justice Hughes, speaking for the court, said at pp. 113, 115, 118, 119:

> "'* * * The best evidence of the state of the decedent's health at the time the transfers were made is the statement of his doctor. The best evidence of the decedent's state of mind at that time and the reasons actuating him in making the transfers are the statements and expressions of the decedent himself, supported as such statements are by all the circumstances concerning the transfers.'
>
> "* * * It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive. * * * The dominant purpose is to reach substitutes for testamentary dispositions and thus prevent evasion of the estate tax. * * * As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or non-existence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death. * * *
>
> "'* * * *Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purpose associated with life, rather than with death, may motivate the transfer.* * * *

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*Italics throughout the brief are our own.

"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts inter vivos which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed. • • • There may be the desire to recognise special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death.

"• • • There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus to give effect to the manifest purpose of the statute.

"• • • The court did not rely merely upon the fact that at the time of the transfers decedent considered that he had recovered from his former illness and believed the assurances given him by his physician that he need have no fear of its recurrence or any 'anxiety whatever about his state of health.' The fact was manifestly important, but, in addition to that, the court held that 'the immediate and moving cause of the transfers was the carrying out of a policy, long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime.' • • • In the view of the court as thus explicitly stated, not only was there no fear at the time of the transfers that death was near at hand, but the motives for the transfers brought them within the category of those which, as described by the Government, are intended by the donor 'to accomplish some purpose desirable to him if he continues to live.' • • •"

THE RULING OF THE CIRCUIT COURT OF APPEALS, OVERTURNING THE BOARD OF TAX APPEALS' FACT DETERMINATION IS BEYOND ITS POWER.

The Court of Appeals, however, in effect disregards all the evidence stressed by this court and the Regulations as important, and from the single fact that the instrument provides an income for his daughter after his death and was intended so to do, infers, contrary to the finding of the Board, that contemplation of death was the moving cause of the gift. It is difficult for us to see how this inference is possible from the evidence. If it is possible, it certainly is not the only inference possible. In the face of the determination of the Board on this question of fact, the Court of Appeals has no power to choose between conflicting inferences.

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> "* * * The same restraints upon jurisdiction were binding upon the Court of Appeals in reviewing the action of the Board, and binding with greater emphasis, for the Court was without power to choose between conflicting inferences unless only one was possible, or to try the case de novo. Helvering v. Rankin, 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732. * * *"

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"* * * Where a general verdict is found by the trial court, it has the same effect as the verdict of a jury. The Appellate Court cannot pass upon the weight of evidence." (Citing many cases.)

"Here, plaintiffs' exceptions to the conclusions of law of the trial court, and to the refusal of the court to reach other conclusions as requested, raised no question save the one of law, whether the court's verdict was wholly without evidence to sustain it. That question does not appear to be substantial. * * * *The ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive.* The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings."

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"Were these gifts made 'in contemplation of death,' as that expression is used, in the statute * * *?" (Citing cases.) "This is purely a question of fact. The fact sought is the controlling motive in the mind of Neal in making these gifts * * * and we cannot disturb the determination of the Board thereon if there is substantial evidence to support such determination. * * *"

In *Commissioner of Internal Revenue v. Sharp et al.*, 91 F. (2d) 804 (Circuit Court of Appeals, Third Circuit), gifts in trust were involved. The Board of Tax Appeals found (30 B. T. A. 532, at 536):

"* * * He was devoted to his family and wished to provide for them in a way to secure them against any possible disposition which he might develop in old age to hazard his fortune in business deals. * * * His desire was to place funds beyond his own control which would insure the financial protection of his wife and children. This was the primary object of the creation of the trusts and of making the transfers, as he expressed himself to the lawyer who prepared the trust instruments for him."

This case was reopened before the Board to permit the introduction of the trust agreements (33 B. T. A. 290). The Circuit Court of Appeals sustained the finding of the Board that the gift was not in contemplation of death and was not taxable.

In *Helvering v. National Grocery Company*, decided by the Supreme Court May 16, 1938, 304 U. S. 282, Mr. Justice Brandeis speaking for the court says at p. 294:

"The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon trial de novo, in effect, an independent determination of the matters which had been in issue before the Board. The court was without power to do so. Helvering v. Rankin, 295 U. S. 123, 131, 132. * * * To draw inferences, to weigh the evidence and to declare the result was the function of the Board. * * *"

In the pending case the court's own statement of the evidence (R. 50-52) is conclusive of its sufficiency. Being without power to choose between conflicting inferences or to weigh the evidence, the court obviously erred in reversing the Board unless the gift was from its very nature, regardless of all other evidence and as a matter of law, in contemplation of death. Such seemed to be the position of the court. "The trust was not designed to make pro-

vision for the beneficiaries during his life. None of the property or increment thereto was to reach them until after his death * * *. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death." (Court's Opinion, R. 54.)

If those factors are presented as merely items of evidence to be weighed with other evidence in the case, then clearly the court is weighing the evidence and drawing its own inferences and conclusions therefrom in violation of the settled rule.

If the court means to say that gifts which are not intended to come into the actual possession or enjoyment of the beneficiaries until after donor's death and so are necessarily pro tanto meant to provide for them after donor's death; if it means to say that such gifts are therefore in contemplation of death as a matter of law, then clearly it is wrong.

In *Smith v. United States*, 16 Fed. Supp. 397 (D. C. Mass. 1936), aff'd. per curiam sub nom., *United States v. Nichols*, 92 F. (2d) 704 (C. C. A., 1), District Judge Brewster said at p. 402:

> "It is argued that the transfer should be deemed as one made in contemplation of death because the decedent thereby provided for his family after his death, and, therefore, it was a testamentary disposition of his property. I take it this is not the test. If it were, every irrevocable trust that provided for the disposition of the trust property after the death of the donor would necessarily be deemed a transfer by way of trust in contemplation of death. That such a test has never been applied is obvious from consideration of the cases."

THE FACT THAT A TRUST INSTRUMENT PROVIDES FOR BENEFICIARIES AFTER DONOR'S DEATH AND THAT DONOR INTENDED TO SO PROVIDE DOES NOT MAKE THE GIFT TAXABLE AS A MATTER OF LAW AS IN CONTEMPLATION OF DEATH.

A reading of the statute, an examination of its history and the history of the Treasury Regulations and a study of the Supreme Court cases is convincing that the position of the lower court is without basis.

HISTORY OF SUPREME COURT CASES.

In cases of the type here involved—trusts in which the income is withheld from the beneficiaries until donor's death—the Government has usually taken the position that they fall under the second of two statutory categories of gifts, (1) in contemplation of death or (2) intended to take effect in possession or enjoyment at or after death. That was the original position taken by the Commissioner in the pending matter (R. 14, 17), but later abandoned. If the court's ruling in our case, however, is correct, it would follow that trusts intended to take effect in actual enjoyment after death, whether or not within the technical statutory meaning of the possession and enjoyment provision, are in contemplation of death. The motive and intent to provide for the beneficiaries after donor's death is by the very terms of the instrument present in all such cases. That is exactly what all such trust instruments do.

Futile and most costly to the revenue would appear the Government's long and unsuccessful struggle, commencing with *Reinecke v. Northern Trust Co.*, 278 U. S. 339, and concluding with *McCormick v. Burnet*, 283 U. S. 784, and sister cases, to establish that such gifts were taxable under the possession and enjoyment clause, if the simple assertion of liability under the contemplation of death clause would have brought success. Moreover, it would seem unlikely that this court with the statute and all the necessary facts before it would repeatedly in that

line of cases reject taxability without comment that on the face of the record taxability was patent on the ground of contemplation of death.

The fact is that in each of those cases the court had before it both provisions appearing in the same sentence of the statute. It had before it the argument that the gift was testamentary because of the postponed enjoyment and intent to provide for beneficiaries after donor's death, and it passed sometimes expressly and sometimes impliedly on the very question involved here.

**THE COURT'S RULING AS TO THE CONCLUSIVE EFFECT OF POSTPONED ENJOYMENT AND INTENT TO PROVIDE FOR BENEFICIARIES AFTER DONOR'S DEATH IS CONTRARY TO MANY DECISIONS OF THIS COURT.**

*Shukert v. Allen*, 273 U. S. 545;
*Reinecke v. Northern Trust Co.*, 278 U. S. 339;
*May v. Heiner*, 281 U. S. 238;
*Becker v. St. Louis Union Trust Co.*, 296 U. S. 48;
*McCormick v. Burnet*, 283 U. S. 784;
*Burnet v. Northern Trust Co.*, 283 U. S. 782;
*Morsman v. Burnet*, 283 U. S. 783;
*Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85;
*Helvering v. Helmholtz*, 296 U. S. 93;
*White v. Poor*, 296 U. S. 98;
*Hassett v. Welch*, 303 U. S. 303;
*Helvering v. Marshall*, 303 U. S. 303;
*Helvering v. Bullard*, 303 U. S. 297; and other cases.

**SHUKERT v. ALLEN.**

The facts as set forth in the District Court (300 F. 754) and in the decision of the Circuit Court of Appeals (6 F. (2d) 551) show that on May 5, 1921, donor created for the benefit of his three children a trust fund of about

two hundred thousand dollars to accumulate for a period of thirty years, subject to slight diminution in case of remote contingencies. He was fifty-seven years of age when the trust was made and died four months later. The District Court found from the donor's own statement that (p. 757):

> "* * * It is a trust created by Mr. Shukert, which he intended to take effect in possession and enjoyment long after he should have passed away; after it might be that the large fortune which he had accumulated had been lost through misfortune, or extravagance, or waste, or things that might happen after that. His care went clear to the time when 30 years should have gone by. His care for his children reached clear to that point, and he intended at that time it should take effect."

The gift was held taxable under the second clause and the ruling was affirmed by the Circuit Court of Appeals (6 F. (2d) 551).

When the case came to the Supreme Court of the United States, *the Government argued* (see outline of Government's argument, 71 L. Ed. 766) that:

> "The intention of Congress, as well as the letter of the law, requires that there shall be included in a decedent's gross estate, the value of all property with respect to which he has made a transfer or created a trust which in substance and effect, though not in form, is testamentary. The trust in question is in substance and effect testamentary, because it postpones the ordinary incidents of ownership until the donor's death, and in fact is, and was intended to be, a postmortem disposition of the property."

Mr. Justice Holmes delivered the unanimous opinion of the United States Supreme Court reversing the lower court and holding the trust not taxable. He discussed its

taxability under the contemplation of death clause as well as under the possession and enjoyment clause, though the latter was the point stressed by the Government and the court. He said (273 U. S. at 547):

> "* * * It seems plain from the little evidence that was put in that the testator was not acting in contemplation of death as a motive for his act, or otherwise, except in the sense that he was creating a fund intended to secure his children from want in their old age, whoever might dissipate the considerable property that he retained and left at his death; and that, being fifty-six years old, if he thought about it, he would have contemplated the possibility or probability of his being dead before the emergency might arise. Of course, it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute. * * *
>
> "* * * But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death."

REINECKE v. NORTHERN TRUST CO.

On January 2, 1929, the United States Supreme Court in the case of *Reinecke v. Northern Trust Co.*, 278 U. S. 339, passed on the taxability under the Revenue Act of 1921* of seven trusts created by decedent during his lifetime. By reason of powers of revocation contained in two of the trusts, it was held that those transfers were not

*Identical with Revenue Act of 1926 in this contemplation of death provision.

complete until decedent's death and on that ground were taxable. In a third, life incomes were given the wife and children with distribution of corpus after donor's death.

> "The other four 1919 trusts were severally made for the benefit of a child of the settlor. As drawn, they provided for the accumulation of the whole income until the period of distribution of the corpus, after the death of the settlor, except so much thereof as the settlor might, from time to time, direct to be paid to the beneficiary named. By amendments made on June 28, 1921, in the manner provided in the trust instruments, the beneficiary under each was to be paid the income." (From Opinion of Circuit Court of Appeals, 24 F. (2d) 91, 92.)

Donor died in 1922.

Here again the Government relied on the possession and enjoyment theory. The Supreme Court, however, had before it trust instruments providing for donor's children after his death. The intent was clear on their face. Under the Court of Appeals' ruling in our case this conclusively showed contemplation of death. Yet, referring to these the Supreme Court said (p. 347):

> "* * * as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax."

It seems reasonable to infer that the court did not consider the intent to provide for his children after his death as shown by the trust instrument to be equivalent to testamentary disposition or contemplation of death.

The court made no distinction between the trust in which the life income was given to the beneficiaries and the four in which it was to accumulat (The amendment of the four trusts in 1921 probably could not alter the intent of the gift of 1919.) Logically there is no distinction so far as

this question is concerned. In each, ultimate provision is made and intended to be made for the beneficiaries after donor's death. And if that intent is to be construed as testamentary and in contemplation of death, then all such gifts are taxable whether the income is to accumulate or to be distributed.

Mr. Justice Stone speaking for the court said (p. 347):

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in the present statute.
>
> "* * * The two sections read together indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment."

MAY v. HEINER.

In *May v. Heiner*, 281 U. S. 238, donor transferred to trustees certain property, the income to be paid to her husband for life, then to her for life "and after her decease all property in said trust, in whatsoever shape or form it may be, shall, after the expenses of the trust have been deducted or paid, be distributed equally among" her four children, their distributees, or appointees. Words could not make clearer her intent to provide for her children after her death.

Again the Government stressed the second statutory ground, apparently not conceiving success possible on the contemplation of death theory. But again the Supreme Court noted the presence of that problem and said (p. 243), Mr. Justice McReynolds speaking for the court:

> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

It then quotes with approval from *Reinecke v. Northern Trust Co., supra*, the passage which we have quoted from that case, ending with the sentence, *"It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in this statute."*

BECKER v. ST. LOUIS UNION TRUST CO.

In *Becker v. St. Louis Union Trust Company and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased*, 296 U. S. 48 (decided November 11, 1935), the contemplation of death issue was directly before the court. Decedent, a man seventy-seven years old, in good health and active in business, executed declarations of trust in favor of each of his four children. The instruments provided for the payment of $300.00 a month out of the income to each child with power on the donor's part to increase or decrease that amount in his discretion; the balance of the income to accumulate and be added to the principal; and the entire trust property to go immediately and absolutely to the child on donor's death. He died seven years later. The value of the trust at that time was $994,195. The district court found that the gift was both

in contemplation of death and intended to take effect in possession and enjoyment after death. The Circuit Court of Appeals for the Eighth Circuit reversed the case (76 F. (2d) 851) and found that the purpose of the gift was to make the children independent and to avoid income taxes. The Supreme Court (296 U. S. 48, 52), in holding the gift not taxable, said, Mr. Justice Sutherland speaking for the court:

> "We are unable to find anything in the record which conflicts with the statement of the court below that evidence that decedent was in any way influenced by the thought of death was wholly lacking."

Yet, there was the trust deed with the definite ultimate object that his children should have the property after his death. True, there were other motives—to save income tax and to make his children independent—and so in our case there was the motive to save part of his fortune from loss in the stock market. Clearly intent to provide for children after death was not even deemed evidence of contemplation of death within the statutory meaning.

On March 2, 1931, three cases were decided by unanimous decisions of the Supreme Court.

### McCORMICK v. BURNET.

In the case of *McCormick v. Burnet*, 283 U. S. 784, 75 L. Ed. 1413, Mrs. McCormick, then eighty-three years of age, created a trust of some seven million dollars. The trust provided that the income should accumulate during the grantor's life with minor reservations. After her death the income was to go to her three children, share and share alike, the principal to be distributed upon the death of the last survivor of said children as each of the children might by will direct. The donor died on July 5, 1923, a few days less than five years after the execution of the trust. The transfer amounted to about one-half of her property.

Considerable evidence was taken as to the state of her health at the time of the execution of the trust. The evidence indicated that she was in good health for one of her age, that she was interested in her charities, that she was interested in making certain changes in her home and was interested in the future. No other evidence as to motive than the evidence of the agreement itself and of the general state of her health and interests is referred to in the Board of Tax Appeals opinion. The Board found that the gift was neither made in contemplation of death nor intended to take effect in possession or enjoyment at or after death.

The Board further held that the gift was not testamentary in character, was not intended to take effect in possession or enjoyment at or after death and was not a part of her estate for purposes of federal estate tax.

On September 20, 1930, the Circuit Court of Appeals in *Commissioner of Internal Revenue v. McCormick*, 43 F. (2d) 277, reversed the ruling of the Board of Tax Appeals on the ground that the gift was one intended to take effect in possession or enjoyment at or after death. The court, however, said at page 278:

> *"The Board found that the trust was not executed in contemplation of death. There is some evidence tending to support this finding. Petitioner does not challenge its soundness."*

It is obvious that it was the intent of the donor to make provision for her children after her death. That is exactly what the trust instrument did. It did not purport to do anything else. In that sense the instrument was clearly one in which the motive was associated with death, but that is not at all the meaning either the courts or the Treasury Department itself gave to the language "transfers in contemplation of death." It should be noted particularly that the only testimony offered in this

case as to motive was the trust instrument itself, and evidence as to the state of health and anticipation of future activities on the part of the donor. Yet neither the Board of Tax Appeals nor the Court of Appeals nor the Supreme Court found that evidence insufficient to establish the nontaxability of this gift under the contemplation of death clause. The Court of Appeals specifically says the evidence is sufficient. The Board of Tax Appeals, with only two out of the fifteen members dissenting, found the evidence sufficient to sustain nontaxability. The Supreme Court affirmed the ruling of the Board of Tax Appeals *in toto*, reversed the Court of Appeals in its holding that the transfer was one intended to take effect in possession or enjoyment at or after death and reaffirmed the ruling it had made in *May v. Heiner, supra.*

This case is in many respects as identical with the case now pending before the court as two cases are often found. Mrs. McCormick was eighty-three years old when the trust was made. Mr. Hendrie was eighty. Both were in good health. Mrs. McCormick was interested in her charities and a new house. Mr. Hendrie was interested in business, golf and the stock market. His intent to gamble in the market gave him one definite and powerful incentive for the creation of his trust which Mrs. McCormick lacked, namely, the desire not to lose *all* of his fortune if the stock market went against him. Mrs. McCormick died *within* five years. Mr. Hendrie died *after* five years. The trusts in each case provided for the cumulation of the income and for distribution to their children after their deaths. Certainly if contemplation of death had any such meaning as is now attributed to it in this case, the McCormick trust would have been taxed as in contemplation of death.

On the very same day as the decision in the McCormick case, March 2, 1931, the Supreme Court in *Burnet v. Northern Trust Company*, 283 U. S. 782, 75 L. Ed. 1412, and in *Morsman v. Burnet*, 283 U. S. 782, 75 L. Ed. 1412, reaffirmed the doctrine of the Heiner case, affirming the Seventh Circuit in the Burnet case and reversing the Eighth Circuit in the Morsman case. It is significant also that at the very term and within a few days of these decisions the decision in *United States v. Wells*, 283 U. S. 102, 75 L. Ed. 867, was rendered. Clearly the court did not deem that this decision in any way conflicted with those in the cases cited.

The Northern Trust Company case, decided by the Seventh Circuit Court of Appeals on June 5, 1930, 41 F. (2d) 732, involved a gift made by donor almost six years prior to her death (seventy-seven years old at death). The gift was an irrevocable deed of trust to the Northern Trust Company reserving the entire net income to the settlor for life. After her death the net income was divided equally among her four children with remainder over to the issue of her children *per stirpes*. Here obviously was a case where the donor was providing for the natural objects of her bounty after her death. No evidence of motive other than that in the trust instrument itself appears to have been offered as no comment is made thereon by the court. The court held the transfer not taxable and its decision was affirmed by the Supreme Court of the United States.

In *Commissioner v. Morsman*, 44 F. (2d) 902, (14 B. T. A. 108), the Board had found that where Morsman reserved to himself the entire net income from the trust estate for life, remainder over to his four sons at his death, the trust was not taxable as a part of his estate though it constituted the bulk of his property and though

he died within three years of the day of its execution. The Circuit Court reversed the Board and the Supreme Court reversed the Circuit Court. Here again neither the Board nor the court makes any comment upon any evidence of motive other than that contained in the trust instrument. It is obvious from the trust instrument that he was providing for the natural objects of his bounty after death. But none of the courts, including the Supreme Court, construed the term "transfer in contemplation of death" to include such transfers merely because of the nature of the instrument, its intent to provide for the natural objects of the donor's bounty after his death, or because of the age of the donor at the execution of the trust.

HELVERING v. CITY BANK FARMERS TRUST CO.

In *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, decided November 11, 1935, decedent, Gertrude F. James, by trust agreement dated February 21, 1930, made provision for her children and her husband after her death. No other purpose for the gift was disclosed. She reserved to herself the income for life. She also reserved the right to revoke with the consent of the trustee and her husband.

Apparently neither the Government nor any of the courts conceived that the gift was taxable under Section 302 (c) of the Revenue Act of 1926 as in contemplation of death merely because donor intended to and did provide for her children after death. Taxability was pressed solely on the ground that it fell within Section 302 (d) of that Act covering revocable gifts. The decision involved the constitutionality of the provision. It was hard fought and resulted in a five to four decision by this court upholding Section 302 (d). Yet the Government contends that both it and this court completely overlooked the all-important fact, if true, that the gift was taxable on its face under the contemplation of death provision because its purpose was to provide for beneficiaries after decedent's death.

In discussing the power of Congress to tax a gift revocable only with the consent of the donee, Mr. Justice Roberts speaking for the court used this significant language (p. 92):

> "* * * It was appropriate for Congress to prescribe that if, subsequent to the passage of that Act, the creator of a trust saw fit to reserve to himself jointly with any other person the power of revocation or alteration, the transaction should be deemed to be *testamentary in character, that is, treated for the purpose of the law as intended to take effect in possession or enjoyment at the death of the settlor.*"

HELVERING v. HELMHOLTZ.

In Helvering v. Helmholtz, 296 U. S. 93, decided November 11, 1935, donor in 1918 created a trust reserving the income to herself for life, "remainder to her appointee by will and remainder to her issue." She reserved the power with the consent of all the "then beneficiaries" to revoke.

The Government battled this case through the courts without even suggesting taxability under the contemplation of death provision. It based its whole claim on the power to revoke. This court denied taxability. Yet the intent to provide for beneficiaries after donor's death is self-evident. Moreover, the provision was to be made as donor should appoint by will. Is it not obvious that for years the Treasury, the courts and Congress have given an entirely different meaning to contemplation of death than that asserted by the Government in this case?

WHITE v. POOR.

In *White v. Poor*, 296 U. S. 98, decided November 11, 1935, half of the income was reserved to donor for life; after her death to go to her children and on their death to their appointees.

Again, we find the clear intent to provide for the beneficiaries after donor's death. *"The fact that upon the final distribution the property would go to her descendants after the death of the survivor of the beneficiares is not enough to justify a finding that the transfer was made in contemplation of death, within the meaning of the statute imposing estate taxes."* (*Poor v. White*, 8 Fed. Supp. 995, 996.)

On appeal the Government completely abandoned any such claim and relied on the power of the trustees to revoke as making it taxable under Section 302 (d). But the Court of Appeals (*White v. Poor*, C. C. A., 1, 75 F. (2d) 35) and this court held it not taxable.

**HASSETT v. WELCH; HELVERING v. MARSHALL; HELVERING v. BULLARD.**

As recently as February 28, 1938, the doctrine of these cases has been reiterated by this court in three cases:

*Hassett v. Welch*, 303 U. S. 303, 82 L. Ed. 575.
*Helvering v. Marshall*, 303 U. S. 303, 82 L. Ed. 575.
*Helvering v. Bullard*, 303 U. S. 297, 82 L. Ed. 572.

In all of these cases the income was reserved to donor for life, his intention being to provide for his dependents after his death. In the first two cases the attempted tax was defeated because the gift was made prior to the Joint Resolution of March 3, 1931, taxing as a part of the estate gifts in which the income is reserved to donor for life. In the latter case the tax was sustained because the gift was subsequent thereto. In none of the cases was the gift held to be in contemplation of death. In all, that claim had been abandoned by the time they reached the Supreme Court.

The argument of the District Court in *Welch v. Hassett*, 15 Fed. Supp. 692, is much the same as that of the

Government here. It was answered by the Court of Appeals (First Circuit), 90 F. (2d) 833, and the contention completely abandoned by the Government when it came to the Supreme Court. Said the Circuit Court at p. 837:

"The first two assignments of error may be considered together and raise the issue whether a trust created to relieve the creator of the demands of his relatives and friends, and to dispose of the estate received from his brother after reserving to himself the entire income thereof for life, as a matter of law, renders the transfer by the trust instrument to have been made in contemplation of death and intended to take effect in possession and enjoyment after the death of the creator and testator.

"*The decisions of the Supreme Court appear to be contrary to this ruling.*

"In May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244, the decedent and creator of the trust transferred properties to a trustee to pay the net income to her husband for life, after his decease to the decedent herself, and after her decease to her children. The court said, 281 U. S. 238, at page 243 • • •;

"'The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent.'" (Citing Burnet v. Northern Trust Co., 283 U. S. 782; Morsman v. Burnet, 283 U. S. 783; McCormick v. Burnet, 283 U. S. 784; Reinecke v. Northern Trust Co., 278 U. S. 339.)

• • • • •

"Nor does the reasoning bind this court by which the District Court arrived at its conclusions that the creator, having accomplished his purpose of evading the burden of managing his estate, as well

as the importunities that he found would inevitably follow the ownership of an estate of over $3,000,000, took one step more and made provisions in the same instrument for disposing of the entire fund after his death, which the court suggests was done to avoid the estate taxes.

*"To dispose of one's property after the termination of the trust existed as one of the major motives in all the cases above cited, and yet the court held that it did not prevent a present, completed, and irrevocable transfer so far as the creator was concerned.*

"We think it is clear from the facts found and admitted by the pleadings that it does not follow from the trust instrument in this case that it was made in contemplation of death, nor intended only to take effect in enjoyment or possession after the creator's death, * * *. The interpretation of the trust deed is a question of law, in view of facts found by the court. We, therefore, are of the opinion that a denial of the motion of the plaintiffs for judgment made during the trial and presumably at the close, was an error of law.

* * * * *

"We think the District Court's interpretation of the trust instrument, in the light of the facts found by him and the admitted facts in the pleadings, was error, and the motion of the plaintiffs for judgment should have been granted."

HISTORY OF ESTATE TAX LAW AND REGULATIONS.

*The Circuit Court's Ruling is Contrary to the Estate Tax Law and the Treasury Regulations.*

On September 8, 1916, the first of the current series of Federal Estate Tax laws was enacted. It contained the following provision:

"Section 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, * * * wherever situated:

* * * * *

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *."

It will be noted that two different types of transfers are reached by this provision: (1) Transfers in contemplation of death, and (2) those intended to take effect in possession or enjoyment at or after death. In all the reenactments of the law this language has remained substantially unchanged.

It is obvious that all gifts "intended to take effect in possession and enjoyment at or after donor's death" are designed to be used by the beneficiaries after donor's death. Such gifts are intended to make provision for the beneficiaries after donor's death, not during his life. None of the property or increment thereof is intended to or will reach them till after his death.

The Court of Appeals in effect says that all such gifts are as a matter of law in contemplation of death regardless of all other evidence. It is evident, however, that Congress did not think so or it would not have specified gifts "intended to take effect in possession or enjoyment at or after his death." The law reads "in contemplation of or intended to take effect in possession or enjoyment at or after his death." If all cases where the intent is to provide for the objects of donor's bounty after his death are covered by the contemplation of death provision, then the possession and enjoyment provision is useless.

"* * * It is a cardinal rule of statutory construction that significance and effect shall, if pos-

sible, be accorded to every section, clause, word or part of the act. In applying the rule it frequently occurs that a particular construction of a provision which the court is urged to adopt cannot be sanctioned, because, according to the view suggested, certain other provisions would thereby be rendered unnecessary, and it should not be presumed that any provision is redundant or useless." 25 R. C. L. 1004, 1005, S. 246.

In *Sarlls v. United States*, 152 U. S. 570, an Act of Congress forbade the sale "of any spirituous liquor or wine" to Indians. The government contended that all intoxicating drinks were within the statute, but the court said:

> "That by the term 'spirituous liquors,' used alone in the statute, it may with some plausibility be contended the legislature meant to signify all intoxicating drinks. But the case is quite different when 'wines' are added to the articles prohibited. In that case it is evident that the legislature did not think that all intoxicating drinks were included in the term 'spirituous liquors,' or they would not have named 'wines.' Under the construction put by the court below on the words 'spirituous liquors,' as including all liquors that are intoxicating, and hence as including lager beer, the word 'wines' is useless in the statute."

In our case, if the Circuit Court is right that all gifts intending to provide for beneficiaries after donor's death are in contemplation of death, then Congress did a further useless thing in passing the Joint Resolution of March 3, 1931, specifically adding a provision for the taxation of gifts where donor has reserved a life interest. Not only that, but the Revenue Act of 1932 specifically added *this

*The addition is in italics.

third category of taxable gifts to the contemplation of death and possession and enjoyment provisions of the statutes—"To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer by trust, or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death* (1) *the possession or enjoyment of, or the right to the income from the property.* * * *"*

By making such amendment Congress plainly says that such cases are not within the meaning of the statutory words "contemplation of death" and that to make them taxable it was necessary to so amend the statute. Nor did the Treasury itself conceive that the mere intent to provide for the beneficiaries after donor's death spelled contemplation of death.

In all the long series of estate tax regulations, from Regulations 37 in 1916 down to Regulations 80 in 1938, it has never been claimed that "contemplation of death" had any such meaning. Health, motive, anticipation of death, age and length of time before death—all the usual evidence on the question of contemplation is detailed, but there is nothing about gifts intended to provide for beneficiaries after death. On the contrary, over and over again the regulations have asserted taxability of only one class of such gifts, namely, those reserving a life interest to donor and of those solely on the ground that such gifts were intended to take effect in possession or enjoyment at or after donor's death.*

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* Art. 24, Regulations 37, 1921 Edition:

"A transfer is taxable where the grantor reserves to himself during life the income of the prop-

The enjoyment of life insurance is obviously postponed till after the death of the insured. In the main its purpose is to provide for the beneficiaries after his death. That the Treasury considered this fact not the test of contemplation of death is evidenced by the fact that it has recognized that the beneficiary of a policy may or may not be named in

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erty transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. * * *"

Art. 18, Regulations 80, 1937 Edition:

"The statutory phrase, 'a transfer * * * intended to take effect in possession or enjoyment at or after his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation or retention by the decedent of the use, or the possession, or the rents or other income or enjoyment of the transferred property, or any part thereof, for his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence his intention that it should extend at least for the duration of his life; * * *

* * * * *

"* * * The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. * * *"

contemplation of death, depending on circumstances entirely aside from the fact of postponed enjoyment.*

The Joint Resolution of March 3, 1931, and the Revenue Act of 1932 (June 6, 1932) were enacted in the face of the continuous Treasury interpretation that mere intent to provide for dependents after donor's death was not equivalent to contemplation of death and of repeated decisions of the Supreme Court culminating on March 2, 1931, with *McCormick v. Burnet, supra,* where the income was to accumulate until donor's death; *Morsman v. Burnet, supra;* and *Burnet v. Northern Trust Company, supra,* where donor reserved the income for life. In each case the gifts were held not taxable though they made provision for the beneficiaries after donor's death. Congress immediately sprang into action. On the very next day a Joint Resolution was passed amending the Revenue Act of 1926.

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* Art. 30, Regulations 63, 1922 Edition:

"Insurance receivable by the estate must be included in the gross estate of all decedents who died after September 8, 1916. Insurance payable to beneficiaries other than the estate, however, need not be included in the gross estate of decedents who died before the effective date of Title IV of the Revenue Act of 1918, unless the insurance was originally payable to the estate, and the policy was thereafter assigned or made payable, to a specific beneficiary in contemplation of, or intended to take effect in possession or enjoyment at or after the decedent's death; such assignment or change in beneficiary not being or a fair consideration in money or money's worth."

In 1927, the Treasury ruled, G. C. M. 1164, C. B., June, 1927, p. 315, that the proceeds of life insurance were not taxable under the contemplation of death provision since there was a specific provision in the statute covering such proceeds. In G. C. M. 16932, C. B., December, 1936, p.

It might have provided for the taxation of all gifts in trust where the income was withheld from the beneficiary until the death of donor. But it did not. It singled out the classes of such gifts it intended to tax, namely, the ones where a life income was reserved to the donor himself. The applicability of the maxim of statutory construction, "*expressio unius est exclusio alterius*" is evident.†

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299, this ruling was revoked. In commenting on this latest General Counsel's Memorandum, Prentice-Hall Estate Tax Service for 1938 in an editorial note to Paragraph 23309 states:

> "The above G. C. M. 16932 will place upon the executor the burden of proving that the transfer of life insurance in a decedent's estate was not a transfer in contemplation of death."

The kind of evidence applicable to such proof appears in *Billings v. Commissioner of Internal Revenue*, 35 B. T. A. 1147, where it is said at p. 1152:

> "• • • He assigned these policies to named persons on June 24, 1931, or within six months from the date of death. The respondent held that the assignment was in contemplation of death. At the time the decedent was suffering from a chronic cardiac valvular disease. The petitioners have offered no evidence to show that the assignment was not made in contemplation of death. We accordingly hold that they were so assigned."

† See 25 R. C. L., p. 981, Sec. 229:

In *Mackay et al. v. Commissioner*, U. S. C. A. (C. C. A. 2) February 7, 1938, 94 Fed. (2d) 558, the court calls attention to the fact that "The enactment in 1924 of Section 302 (d) is an indication that Congress then recognized the limited scope of Section 302 (c), or to say the least, doubted that subdivision (c) included cases of this kind."

That such executive and judicial construction, excluding from the category of gifts per se in contemplation of death those not intended to come into beneficiaries' use until after the donor's death, has also become the binding legislative construction can hardly be doubted. It is too late to claim that all such gifts are per se testamentary and therefore in contemplation of death. The term "contemplation of death" may be vague. Its meaning may not be clear and certain, but one thing about it that is clear and certain is that it has not the meaning on which the lower court relies.

The continuous Treasury and court construction of the term "contemplation of death" as not including gifts merely because intended to provide for beneficiaries after donor's death has by legislative reenactment become a part of the law.

In *Hecht v. Malley*, 265 U. S. 144, this Court said, at p. *153*:

> "* * * In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment. Sessions v. Romadka, 145 U. S. 29, 43, 36 L. Ed. 609, 614, 12 Sup. Ct. Rep. 799; Latimer v. United States, 223 U. S. 501, 504, 56 L. Ed. 526, 527, 32 Sup. Ct. Rep. 242."

In *Hassett v. Welch*, *supra*, Mr. Justice Roberts speaking for the Court said:

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Section 302 (c) is the contemplation of death provision and 302 (d) also made taxable trusts "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke."

"Not only is the legislative history of Sec. 803 (a) of the Act of 1932 bare of indication of any purpose that it should affect past transfers, but what appears tends to disprove any such thought. Moreover, the reenactment of the Resolution of 1931 in the light of the administrative rulings requires the conclusion that Congress approved and adopted the administrative constructions of the provision it reenacted."

In *Copper Queen Consolidated Mining Company v. Territorial Board of Equalization of the Territory of Arizona*, 206 U. S. 474, 51 L. Ed. 1143, Mr. Justice Holmes, speaking for the Court, used the following language, at p. 479:

"* * * And again, when, for a considerable time, a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed. New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 402, 50 L. Ed. 515, 525, 526, 26 Sup. Ct. Rep. 272."

To like effect are *Massachusetts Mutual Life Insurance Co. v. United States*, 288 U. S. 269; *Murphy Oil Company v. Burnet*, 287 U. S. 299; *Hartley v. Commissioner*, 295 U. S. 216; *Old Mission Portland Cement Co. v. Helvering*, 293 U. S. 289; *Burnet v. Chicago Portrait Co.*, 285 U. S. 1.

### THE GOVERNMENT'S POSITION IN THIS CASE.

The Government's position as disclosed by its brief on certiorari is based not only on a mistaken definition of contemplation of death, but includes a wholly erroneous theory of what constitutes a testamentary disposition of property. The outstanding and characteristic difference between a testamentary gift and an *inter vivos* gift is found

in the fact that the testamentary gift is ambulatory until the death of the testator. It has no binding effect on the testator until that time. It confers no rights. He can revoke it at will. An *inter vivos* gift binds him during his life—and creates vested interests in the donees—and that, regardless of when the donee actually gets its use and benefit—whether before or after donor's death.

The Government says (Brief opposing certiorari, p. 7):

> "* * * If a testamentary disposition is defined as one intended to provide for the objects of testator's bounty at death, then clearly a substitute therefor is one which is intended to accomplish the same purpose, even though title is presently transferred."

The major trouble with the argument is that it is not properly so defined. We have heretofore, we believe, demonstrated that fact.

Equally amazing is the Government's argument as to what constitutes a substitute for a will (Brief opposing certiorari, p. 5):

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> "* * * The essential characteristic of an instrument testamentary in its nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and per contra no rights have accrued to and no estate has vested in any other person. The death of the maker establishes for the first time the character of the instrument * * *. Upon the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and when the instrument creating the trust is other than a will, that estate or interest must pass

"* * * To accomplish the result intended, he changed his will, in which he had set up a testamentary trust, and in place thereof made the transfer in trust in *praesenti*. The reason for making the substitution, asserted by the petitioners, is that the decedent desired to speculate. But this was not the reason for making the gift, but only for making it in the form of a trust instead of a will. Since the trust was made in lieu of the will, it was clearly a *pro tanto* substitute for the prior testamentary disposition of the property."

But the will was never changed. It was executed two years before the creation of the trust (R. 44) and probated without change. Possibly the Government meant that every gift of property lessens the amount remaining to be given by will. True, but meaningless. But says the Government: The gift was a substitute for the will; the transfer was made by gift instead of by will only to avoid losing the property in the stock market. That admission is quite important. It admits that the gift accomplished something that could not be accomplished by will, and that that something was the motive causing the transfer at the time it was made. Can that be termed a substitute for a will in any different sense than every gift is a substitute for a will? It was wholly different from a will in every respect save one. It accomplished a definite, important purpose during donor's life in saving the property from the dangers of the market.

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immediately. * * * But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the *cestui* may be made to commence in the future and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate." *Nicholas v. Emery*, 109 Cal. 323, 329, 41 Pac. 1089: Quoted in Perry on Trusts and Trustees, Seventh Edition, Vol. 1, p. 119.

The testator irrevocably parted with title during his life. The right thereto irrevocably vested in donees during his life. Nothing in connection with it depended on probate at his death. The only resemblance to a will is in the fact that the donees were not permitted to spend any of the money during donor's life. That is a characteristic of many gifts not testamentary in nature.

But the Government seems to contend that since he had drawn a will two years before, devising the bulk of his estate in trust for his daughter, this gift in trust was therefore testamentary and merely a substitute for the will. Logically, the same argument would have applied if the will had made an outright devise to the daughter and the gift had been an outright gift without the intervention of a trust.

To contend that a person who draws a will must thereafter make his *inter vivos* gifts either to a different person or of a different character than provided in the will, in order to avoid having the gift declared a testamentary substitute, wholly disregards the essential characteristics of the two methods of transfer. It exaggerates nonessential incidents into major characteristics. If sound, it would follow that one who has not made a will, but whose estate will pass to his heir at law, can make no gift to such heir without its being a substitute for disposition at death and therefore in contemplation of death—in complete disregard of health, age, activity, thought of future life, anticipation of death or motive in making the gift. The argument is palpably unsound.

The statute makes contemplation of death the condition of the imposition of the tax. The transfer must be brought about by fear or thought of death arising from bodily or mental conditions conducive thereto—usually ill health.

The Government seems to propose a substitute for the statutory condition. It would disregard these usual factors and declare that all transfers are subject to the tax if the

provisions of the trust closely resemble the disposition made by a prior will. It is doubtful if even a statutory provision could constitutionally make a conclusive presumption that such gifts are in contemplation of death. Yet the Government in this case would have the Court, in effect, add such a provision to the statute by judicial fiat and then declare it constitutional.

In the Igleheart and Updike cases (*Igleheart v. Commissioner*, 77 F. (2d) 704; *Updike v. Commissioner*, 88 F. (2d) 807) relied on by the Government, contemplation of death was found by the Board of Tax Appeals in the light of all the facts—not simply from the nature of the trust instruments. Those findings of fact, taking into consideration health, purpose and all other elements, were sustained by the Court of Appeals. The cases are hardly authority for the proposition that everything must be disregarded save the nature of the trust instrument.

## IX.

### CONCLUSION.

There is not an intimation in the evidence, the findings of the Board of Tax Appeals or the opinion of the Circuit Court of Appeals that there was any intent or attempt by Mr. Hendrie to evade the provisions of the estate tax law. Commendable motive is conceded by the lower Court. His motive of avoiding loss in the stock market was one definitely associated with life and clearly indicates a definite concern connected with his future activities.

In determining the proximate cause of this *inter vivos* transfer, the Court will search the record in vain to find anything to indicate that it would have been made but for Mr. Hendrie's fear of the market. Love of family and desire that his daughter have something after his death may have contributed to that fear, but the fear caused the *inter vivos* transfer.

The undisputed evidence of his soundness of health and mind, his activities in life, his annual trips to California, his golf, his attention to business, his plans for future market speculations, and the continuance of those activities for more than five years after the gift, are certainly some evidence on the question of his expectancy of death.

Is all this, including the finding of the Board of Tax Appeals, to be held for naught, on the theory that intent to provide for beneficiaries after death—an intent that is present every time a life insurance policy is written or a premium thereon paid—is conclusive evidence that at the particular time the donor had an unusual and special expectation of death, not common to the ordinary man, described as contemplation of death?

We respectfully submit that the lower Court was without power to overrule the determination of the Board of Tax Appeals that this gift was not in contemplation of death, and urge that its decision be reversed.

Respectfully submitted,

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## APPENDIX A.

The Government's claim is based on Section 302 (c) of the Revenue Act of (February 26) 1926, as amended, 26 U. S. C. A., Sec. 411 (c); 44 Stat. 70; March 3, 1931, c. 454, 46 Stat. 1516; June 6, 1932, c. 209, Sec. 803 (a), 47 Stat. 279:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— • • •

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Joint Resolution of March 3, 1931 (Public No. 131—Seventy-first Congress):

"RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the first sentence of subdivision (c) of Section 302 of the Revenue Act of 1926 is amended to read as follows:

" 'To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.' "

## APPENDIX B.

Estate Tax Regulations 37, 1921 Edition.

### "TRANSFERS IN CONTEMPLATION OF DEATH.

"ART. 23. *Nature of transfer.*—The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death whenever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions which prompts persons to dispose of their property to those who they deem proper objects of their bounty. The cause which induces such bodily or mental conditions is immaterial; and it is not necessary that the decedent be in the immediate expectation of death. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession of the property. Transfers made within two years of a decedent's death are presumed to be taxable if they are of a material part of his property and are in the nature of a final disposition thereof. Where a transfer is of this character, the executor must disclose the transfer in the return; but he may submit therewith evidence that it was not made in contemplation of death. The executor must also return transfers by the decedent of a material part of his property to relatives, though made more than two years before his death; but he need not list them as taxable if he contends otherwise. All facts relating to the transfer should be stated, including the motive therefor, the decedent's state of health, and his anticipation of death. The presumption of taxability may be rebutted by proof that the transfer was not induced by bodily or mental conditions leading the grantor to make a disposition of property testamentary in its nature. The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death.

## "TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH.

"ART. 24. *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserves an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. Where the property does not produce income, its value as of the date of the decedent's death should be ascertained, and so much of this sum as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the grantor makes a reservation of the annuity out of the property conveyed, or exacts from the grantee an agreement to pay the annuity. A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decedent's life is payable to some one other than himself. Example: The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable."

Estate Tax Regulations 68, 1922 Edition.

"TRANSFERS IN CONTEMPLATION OF DEATH.

"ART. 18. *Nature of transfer.*—The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession and enjoyment of the property. Any transfer made by a decedent within two years prior to his death, without a fair consideration in money or money's worth, is presumed to be taxable if of a material part of his property and in the nature of a final disposition or distribution thereof. The executor must return the value, as of the date of decedent's death, of all property transferred by the decedent at any time in contemplation of death, where the transfer was not a bona fide sale for a fair consideration in money or money's worth, and must disclose in the return all transfers of a material part of decedent's property made at any time without such consideration, but need not include in the gross estate the value of such thereof as he contends were not made in contemplation of death, in which event he may submit with the return evidence of all material facts tending to disclose the decedent's motive at the time, his then anticipation of death, and mental and physical condition.

"The presumption of taxability of a transfer made within the two-year period may be rebutted by proof that it was not made under the conditions stated in the statute, and such proof must be filed with the return. Unless proof is submitted which is sufficient to rebut the presumption the

transfer will be included in the gross estate in computing the tax.

"The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability."

Estate Tax Regulations 70, 1929 Edition.

"TRANSFERS IN CONTEMPLATION OF DEATH

"ART. 16. *Nature of transfer.*—The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death. A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. Such a transfer is taxable, although the decedent parts absolutely and immediately with his title to and possession and enjoyment of the property.

"Transfers made by the decedent in his lifetime, other than transfers intended to take effect in possession or enjoyment at or after death (see Art. 17), excepting bona fide sales for an adequate and full consideration in money or money's worth, must be returned for tax, or disclosed in the return, as follows (see also Art. 20):

* * * * *

"The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not, in and of itself, determinative of its taxability."

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1938.

No. 30

THE COLORADO NATIONAL BANK OF DENVER AND GERTRUDE HENDRIE GRANT, Executors of the Estate of EDWIN B. HENDRIE, Deceased, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

## REPLY BRIEF FOR PETITIONERS.

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## INDEX.



## CITATIONS.

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## REPLY BRIEF FOR PETITIONERS.

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The Government's brief clearly illustrates the wisdom of the general rule that a finding by the Board of Tax Appeals on a question of fact is final.

In this case there was a stipulation of certain facts and stipulated evidence of certain witnesses as to further pro-

bative facts. The Government contends that a consideration of this evidence and of the stipulated facts requires a contrary conclusion to that reached by the Board of Tax Appeals on the ultimate fact.

> "To do so would require the court to find the ultimate fact from the probative facts and thereupon substitute its conclusions for the conclusion of the Board of Tax Appeals and reverse the decision because it had reached a different conclusion as to the ultimate fact. This cannot be done." *Tricou* v. *Helvering*, (C. C. A. 9) 68 F. (2d) 280, 282. See also *Wilson* v. *Merchants Loan & Trust Co.*, 183 U. S. 121.

The Government says the evidence was undisputed. True. But the meaning of the evidence and the inferences to be drawn from it are very definitely in dispute.

The particular evidence which the Government deems contrary to the conclusion reached by the Board is the evidence as to the donor's motive in making the gift. It claims that this evidence shows that donor's only motive for making the gift was to provide for his daughter after his death (Br. pp. 11, 33), and that his statement that he wanted to save the property from the vicissitudes of his market speculations must be construed as meaning that he only wanted to save it in order to provide for his daughter after his death (Br. p. 30) and by inference that but for that fact he wouldn't have wanted to save it at all.

We believe this to be an unjustified and strained interpretation of the evidence. Certainly the Board of Tax Appeals did not make any such finding of fact.

As we interpret the evidence the donor when he found himself imbued with the speculative fever of the bull market of 1927 became alarmed lest he should involve his entire fortune in this gamble. He may be assumed to have had the normal human desire common to all not to lose everything he had. Moreover he wanted to avoid the discomfort of the worry which would have accompanied the risking of his entire fortune. He also felt a certain obligation to

make provision for his daughter. He went to his banker, discussed her "then present and future needs" and directed the drawing up of the trust instrument. Three years later when the crash had come he told his son-in-law that despite his speculations his daughter had been provided for by this trust. His conversation at the drawing up of the instrument save for his expressed desire to play the market was no different than would be necessary in any case to direct the drafting of such an instrument.

The Government construes the testimony as meaning that donor *avowed* that his motive and purpose in making the transfer was to provide for his daughter after his death (Br. pp. 11, 33). We do not so construe the testimony nor did the Board of Tax Appeals find any such fact.

It is on the basis of this supposed avowal of motive that the Government attempts to distinguish the long life of cases cited in our main brief. Those cases demonstrate that the mere *intent* to provide for one's beneficiaries after death as shown by the trust instrument itself does not make the gift taxable.

We submit that the only way even such an *intent** can be spelled out of the evidence in this case is by inference from the terms of the trust instrument and in that respect it differs not at all from *Shukert* v. *Allen*, 273 U. S. 545, *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *McCormick* v. *Burnett*, 283 U. S. 784, and other cases cited in our principal brief.

There is no mention in the conversation with the trust officer of any motive of providing for his daughter after death. And certainly there was no avowal that that was his dominant motive or his only motive.

Before the Board of Tax Appeals the Government made no such claim of avowed motive. As the Board said (R. 28):

"The Commissioner relies upon the fact that the income was to be accumulated and added to corpus dur-

*To be distinguished from motive.

ing the life of the donor and consequently the beneficiaries were to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death."

In the Circuit Court of Appeals the argument was based on the same proposition (p. 5 Government's Br. U. S. C. C. A. #1566):

> "Since the trust provided for the accumulation of the income until his death, however, *it must necessarily be inferred** that his purpose was to provide for his daughter in the event of loss through speculation not during his lifetime but upon his death."

That correctly states the evidential basis on which the Government claimed the right to draw the inference of contemplation of death.

The Government's brief, however, just filed in this court is replete with such expressions as (Respondent's Br., p. 11):

> "The court looked to the terms of the transfer merely in order to see whether the decedent had carried out his *avowed** purpose to make sure provision for his daughter and her children after his death."

(Page 33)

> "It is to be observed in this connection that in stating the supposed analogy the petitioners wholly failed to state the full purpose of the decedent as declared by him to the trust officer, namely that he desired to conserve the property *only** in order that he might provide for his daughter and her children after his death."

This is merely an attempt to substitute its interpretation of the evidence for that of the Board and to use that interpretation for the purpose of reaching a different conclusion

*Italics our own.

than reached by the Board. This cannot be done. The exact language of the witness on this point, Mr. Bancroft (R. 41), read as follows:

> "Mr. Hendrie expressed * * * the thought that after he made this trust agreement he would then have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish and that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in said trust deed and thereby putting it entirely beyond his own power to otherwise dispose of the same contrary to the provisions of the said trust deed and to remove it from the vicissitudes of his speculations. Mr. Hendrie expressed doubt as to the stability of the market and expressed a desire to 'play on the market' more actively and in a more speculative way than in the past. Mr. Hendrie often spoke of his intention of thus occupying himself for the rest of his life, and in giving less time to the Hendrie and Bolthoff business."

He also discussed "the then present and future needs of his daughter" (R. 41), and * * *

> " * * * how he might best transfer a part of his assets in the interest of his daughter, Gertrude Hendrie Grant, her descendants and for her heirs, so that whatever might happen to his financial affairs in the future such persons would be provided for." (R. 41)

While the Government throughout its brief speaks of donor's *avowed* purpose of providing for his beneficiaries after death, it not only points out no evidence of such avowal but in effect admits there was no such avowal. It says (Br. pp. 30, 31):

> "It cannot be said upon the basis of any evidence in the case that the decedent intended to make provisions for the objects of his bounty during his lifetime. If that had been his purpose he could and would have made outright gifts to them or would have made provisions for the payment of the income to them during

> his lifetime or otherwise made that purpose effective. The transfer he made makes absolutely no provision for them during his lifetime."

That is precisely the same argument that was made by the Government in *Shukert* v. *Allen* (*supra*), *Reinecke* v. *Northern Trust Co.* (*supra*), *McCormick* v. *Burnet* (*supra*), *Becker* v. *St. Louis Union Trust*, 296 U. S. 48, and the other cases which it seeks to distinguish on the ground that here there was an avowal. In fact, of those cases the Government (Br. p. 26) admits:

> "The effect of this dicta and decision is merely that the fact of transfer containing provisions for the distribution of the property at or after death is not alone sufficient to show that the actuating purpose for the transfer was to provide for the objects of bounty at death and the disposition is consequently in contemplation of death."

Our point is that the Government's case as presented to the Board of Tax Appeals and as shown by the evidence is nothing more than a claim that an irrevocable gift in trust which accumulates the income during donor's life is *per se* in contemplation of death.

Having inferred from the evidence something that was not found there by the Board of Tax Appeals, to-wit, this avowal outside of the trust instrument, and having further read into the evidence a further avowal that "he desired to conserve the property only in order that he might provide for his daughter and her children after his death" (Br. p. 33)—something that the Board of Tax Appeals neither found nor inferred from the evidence—the Government jumps to the conclusion that the sole motive for the transfer was to provide for his daughter after his death and argues the law as though the question was whether a transfer, the sole motive for which was to make such provision, is the same motive that leads to a testamentary disposition (Br. p. 15).

It wholly disregards the evidence of donor's fear of the market and his desire to save the property from loss during his lifetime and his desire to avoid worry. None of these are testamentary motives in the remotest sense. But it would have this court weigh the testimony, disregard those factors and by so doing arrive at an ultimate fact contrary to that arrived at by the Board of Tax Appeals.

**Intent and Motive Are Not Synonymous.**

"The Government contends that, in view of the fact that the undisputed evidence shows that the decedent *intended** by the transfer to make sure provision for his daughter and her children after his death, the case turns solely upon the classification of the assigned *motive.**" (Br. pp. 10 and 11)

By an utterly indiscriminate use of the words "intent," "motive" and "purpose" throughout the brief it arrives at the conclusion that if there is an intent to provide for the beneficiaries after donor's death, or a purpose to so provide by the trust instrument, the intent is necessarily the dominant motive for the transfer.

That intent and motive are not in law synonymous seems fairly clear.** Take the old class-room type of illustration. Mr. X is walking down a lonely street on a dark night. He is accosted by a burly beggar, who asks him for a quarter. He hands the beggar a quarter. When he does so, his intent is to give the quarter to the beggar. His motive may be fear, it may be a charitable instinct, or it may be the desire for the self-satisfaction that one obtains by such a gift. The fear in turn may be influenced (1) by the fact that he is going to take out a life insurance policy the next day and does not want to be injured before that is taken care of, (2) by a general desire not to suffer the physical

*Italics our own.

**Intent is the foreseen result of an act. Motive is the reason—the consideration which determines choice or induces action.

discomfort of being beaten up, (3) just plain cowardice. Each one of these influences may in turn be traced back to other possible underlying factors.

Applying this method to the present case, the Board of Tax Appeals had before it this state of facts: donor is about to plunge in the stock market; he makes a transfer in trust of part of his property; the trust instrument provides for an accumulation of the income until after his death, thereafter to his daughter and her heirs. He directs the trust officer as to the disposition of the property. His intent is to make the specific transfer in trust, which he does make. His motive is fear of loss—the desire to preserve the property from the vicissitudes of his speculations. Back of this motive there may be *arguendo* (1) simply the natural human desire not to lose everything he had spent a lifetime of hard work in acquiring. This is a universal desire which exists whether one has any particular use he wants to put the money to or not. (2) The desire not to lie awake nights worrying about the speculations—the all inclusive human instinct to avoid discomfort. (3) The desire to be relieved of the burden of managing a part of his estate since he has reached the conclusion that he is likely to gamble it away if he keeps it. (4) Pride—the desire not to appear a complete fool if the market crashed and everything was wiped out, and (5) The desire to do some particular thing with his money—as shown by the trust instrument. It may have been permissible for the Board of Tax Appeals to infer from the evidence showing his fear of his speculative tendencies that any one or all of the above impulses contributed to his fear.

In effect, the Government's position, however, is that the only possible reason why he didn't want to lose all of his property was that he wanted it to go to his daughter after his death. We submit that the contention is contrary to human experience. People don't want to lose their property whether they have anybody to leave it to or not. Nobody throws his money in the fire.

There are at least two constant human instincts in respect of property—(1) the desire not to have it lost or destroyed, and (2) the desire to provide for one's family. We submit that the two exist independently of one another. In its brief before the Board of Tax Appeals the Government itself recognized that the motive to preserve property from loss in this case was independent and was not contemplation of death. It said (p. 25, Respondent's Br. B. T. A. 78040)

> "While it is possible that the desire to protect a portion of his fortune from temptation to speculate with it may have been one of the motives for the transfer, it is not believed it was the dominant or principal motive."

We submit that it was the function of the Board of Tax Appeals to draw the inferences and interpret the evidence. It did not draw the inference on which the Government now relies.

**The Government Misconstrues Our Brief.**

The Government makes much of the statement on page 7 of our brief

> "In determining the proximate cause of this *inter vivos* transfer the court will search the record in vain to find anything to indicate that it would have been made but for Mr. Hendrie's fear of the market. Love of family and desire that his daughter have something after his death may have contributed to that fear but the fear caused the *inter vivos* transfer."

It claims this is a concession that desire to provide for his children after death was *the* contributing cause (Br. p. 12, 27) and throughout the brief assumes it was the only cause. We submit there is no justification for such an interpretation. The evidence does not show it to be a fact. Again, on page 34, it defines our position as

> "The contention that a transfer springing from the purpose to provide for the objects of bounty at death is not made in contemplation of death * * *"

Our brief does not concede that the transfer sprang from any such purpose, nor does the evidence show that it did, nor did the Board of Tax Appeals find that it did. Our contention throughout was that the gift sprang from the motive of preserving his property from loss and avoiding the fear and worry that would have been involved in risking it all. Again, (page 38) our position is described as:

> "The petitioner's contention that the *motive* to provide for objects of bounty at death is immaterial."

The Government clearly fails to distinguish between intent and motive. Our position was and is that an intent is shown by the trust instrument here as in the *Reinecke case* and other cases cited. but that the motive is something entirely different. The Government's whole brief, we believe, to be a misconception of our position, largely because of its confusion as to the legal concept of intent and motive and its assumption of certain inferences from the evidence which we do not believe are justified.

## Contemplation of Death is a Question of Fact and Was Treated as Such in This Case.

It is settled law as shown by the authorities in our opening brief and as recognized by the lower court that contemplation of death is a question of fact to be determined by the Board of Tax Appeals. The Board of Tax Appeals made a general finding that the transfer here was not in contemplation of death. A finding on that fact was the only finding asked for by the Government.

The Government's request reads as follows:

> "Respondent requests the following finding of ultimate fact: That the transfer in respect of the trust created by instrument dated January 7, 1927 (Ex. C)

was made in contemplation of or intended to take effect in possession or enjoyment at or after his death within the meaning of Section 302 C of the Revenue Act of 1926." (Respondent's Br. B. T. A. 78040, p. 13.)

The Government now says, however, that this must be construed in this case not as a question of fact but as a question of law, because the Board of Tax Appeals relied on the opinion of the Supreme Court in *United States* v. *Wells*, 283 U. S. 102 in its determination. We submit that ever since that decision the Board of Tax Appeals in all cases has looked to that opinion for guidance as to the meaning of contemplation of death. There is nothing whatever in the Board's opinion to indicate that it misinterpreted the Wells case. The Court of Appeals simply drew a different inference from the evidence than did the Board of Tax Appeals, and the Government in this case is asking this court to draw a different inference from the evidence, as to donor's desire to avoid the dangers of market speculation, than did the Board of Tax Appeals. But "to draw inferences, to weigh the evidence and to declare the result was the function of the Board," *Helvering* v. *National Grocery Co.*, 304 U. S. 282, 294.

The Government complains that no special findings were made. (Respondent's Br. p. 17.) But it only asked for the general finding as to whether the gift was in contemplation of death.

**Memorandum of the Board of Tax Appeals Constituted a Finding of the Ultimate Fact that the Gift Was Not in Contemplation of Death.**

That the Board of Tax Appeals may make its report in the form of special findings, an opinion, or a memorandum opinion is settled law. In *Emerald Oil Co.* v. *Commissioner* (C. C. A. 10), 72 F. (2d) 681, 683, the court said:

"By the use of the disjunctive 'or' Congress manifested the intention to leave it optional with the Board to make its report in the form of special findings, an

opinion, or a memorandum opinion. See House Reports, Vol. 1, No. 2, page 30, 70th Congress, First Session. Under Section 907 (b) as amended a written opinion may perform the function of a finding of fact, and we may look to it to determine what the decision is and the facts upon which it is based."

To the same effect are:

*Insurance & Title Guaranty Co.* v. *Commissioner* (C. C. A. 2) 36 F. (2d) 842. Certiorari Denied, 281 U. S. 748.

*California Iron Yards Co.* v. *Commissioner*, 1931 (C. C. A. 9), 47 F. (2d) 514, 518.

*Sheppard & Myers, Inc.*, v. *Commissioner*, 1930 (C. C. A. 3), 45 F. (2d) 50, 51.

*Olson* v. *Commissioner*, 1933 (C. C. A. 7), 67 F. (2d) 726, 728.

*Commissioner* v. *Crescent Leather Co.*, 1930 (C. C. A. 1), 40 F. (2d) 833, 834.

**The Finding of This Ultimate Fact Carries With it the Finding of All Facts Necessary to Sustain the Judgment.**

In *Tricou* v. *Helvering* (C. C. A. 9), 68 F. (2d), 280, there was involved an appeal from the decision of the Board of Tax Appeals. In discussing the effect of the finding of an ultimate fact. The court said (p. 282):

"If the appellate court has no power or authority to determine the ultimate facts from the probative facts, it would seem to follow that, where the findings of the Board of Tax Appeals contain the necessary ultimate facts to support the judgment, the court will not determine whether the probative facts stated in the findings would lead to a different conclusion as to the ultimate fact. To do so would require the court to find the ultimate fact from the probative facts and thereupon substitute its conclusion for the conclusion of the Board of Tax Appeals and reverse the decision because it had reached a different conclusion as to the ultimate fact. This cannot be done. This would seem to follow from *Wilson* v. *Merchants' Loan & Trust Co.*,

183 U. S. 121, 22 S. Ct. 55, 57, 46 L. Ed. 113, where the parties entered into a stipulation as to the facts and the cause was submitted to the trial judge on the stipulation. The court made no special findings of fact, but made a general finding. After quoting from the statement of facts the court said:

"'This statement has been referred to for the purpose of understanding the materiality of certain facts not found or agreed upon, the failure to do which prevents our use of the statement in the decision of the case. * * * When there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a material ultimate fact might be inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute.

"'As to what is necessary in special findings or in an agreed statement of fact, the authorities are decisive. It is held that upon a trial by the court, if special findings are made, they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties; and if the finding of facts be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions; and in such case the bill cannot be used to bring up the whole testimony for review, any more than in a trial by jury. Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608 * * *

"'It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. Supervisors v. Kennicott, 103 U. S. 554, 26 L. Ed. 486. But as such equivalent, there must of course be a finding or an agreement upon all ultimate facts, and the statement must not merely pre-

sent evidence from which such facts or any of them may be inferred.'

"It will be observed that in this latter case the trial court had made a general finding in favor of the appellee; that the parties had agreed upon certain ultimate facts and in addition thereto certain evidentiary facts; that the appellant claimed that the statement of facts including the ultimate facts and the evidentiary facts required a contrary conclusion to that reached by the trial judge. The Supreme Court declined to consider the evidentiary facts for the purpose of determining whether the ultimate facts derived therefrom, plus the ultimate facts stipulated, required a reversal of the judgment. In the case at bar we are asked to weigh the evidentiary facts and reverse the finding of the Board of Tax Appeals of the ultimate facts, which is exactly what the Supreme Court refused to do in the case just cited. Wilson v. Merchants' Loan & Trust Co., supra.

"The finding of the Board of Tax Appeals on the only ultimate fact in issue is as follows:

"'In this process of refinancing, petitioner's loss occurred in 1922. Can it be said that this loss is such a loss as petitioner is entitled to use in determining a "net loss" within the meaning of Section 204 of the Revenue Act of 1921 and bring forward and use as a deduction in determining her net income for 1923? We do not think so. * * *'"

See also:

*Winnett* v. *Helvering* (C. C. A. 9) 68 F. (2d) 614, 615.

Compare:

*Eastman Kodak Co.* v. *Gray*, 292 U. S. 332.
*Fleischmann Construction Co. v. United States*, 270 U. S. 349.
*Harvey Co.* v. *Malley*, 288 U. S. 415

holding that in the absence of special findings the general finding of the court is conclusive upon all questions of fact.

In *Palmer* v. *Commissioner*, 302 U. S. 63, 70, this court, referring to a finding of the Board of Tax Appeals, said:

> "* * * The findings are inferences which the Board was free to draw from all facts and circumstances disclosed by the record. Such a determination of fact is not to be set aside by a court even if upon examination of the evidence it might draw a different inference."

The principle is also well established that evidential facts may not be used to overcome the finding of ultimate fact unless they compel an opposite conclusion as a matter of law.

*Almours Securities, Inc.* v. *Commissioner*, (C. C. A. 5th, 1937) 91 F. (2d) 427.

From these established principles it is apparent that on review of a decision by the Board of Tax Appeals all of the evidence must be construed in the light most favorable to the conclusion reached by the Board. It is not sufficient that the reviewing court construes the evidence differently than did the lower court, or would have decided the case differently than did the lower court. The Board of Tax Appeals in effect found that the controlling motive for Mr. Hendrie's gift was his desire to save his property from loss in the stock market. If a desire to give it to his daughter after his death would constitute contemplation of death, then the Board in effect found that such was not the controlling motive in making the gift, but that simply the general desire common to all to preserve property from loss was the motivating force. Such is the necessary effect of the general principles above outlined. The mere statement by the donor that he contemplates speculation in the market and desires to preserve a part of his property from the dangers thereof is amply sufficient to sustain such a finding, and it is hardly necessary for him to say that he is imbued with the universal desire of preserving property

from loss—a desire that exists regardless of what one is going to do with the property when it is saved from danger.

**The Government's Argument as to the Testamentary Nature of the Gift.**

The Government contends that since a will had been drawn two years before the gift with provisions somewhat similar to the provisions of the trust, and since the trust did withhold from the beneficiary the use of the property until after donor's death, that it was necessarily testamentary, and if testamentary then necessarily in contemplation of death. This again involves a question of fact, and of the inferences to be drawn from the evidence. It might depend to some extent on how exactly the trust instrument resembled the will, on how close together in point of time they were executed, on whether they were considered together, etc. In this particular case there is a very considerable difference between the trust instrument and the will. In the will numerous specific bequests were made, definite monthly payments were to be made to the daughter regardless of the amount of income, definite annual payments were to be made to named grandchildren regardless of the amount of the income. In the trust deed the daughter gets so much of the income as she may call for, but none of the principal, and the grandchildren get nothing until her death. The will was executed two years prior to the date of the trust deed and was never mentioned at the time the trust deed was executed. The argument seems to be, however, that any instrument withholding the actual use of the income until the donor's death is testamentary. That precise argument has been made over and over again to this court.

In *Nichols* v. *Coolidge*, 274 U. S. 531, it was stressed at great length that the donor had made a gift in trust, retaining a life interest in herself. Mr. Justice McReynolds outlined the Government's contention as follows (page 540):

"For the United States it is said * * * that what Congress intended was to provide a measure for the tax which would operate equally upon all those who made testamentary dispositions of their property, whether this was by will or intestacy or only testamentary in effect; * * *. And the conclusion is that the measure adopted is reasonable, since the specified transactions are testamentary in effect.

"But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentory and it bears no substantial relationship to the transfer by death."

In *May* v. *Heiner*, 281 U. S. 238, the gift reserved to the donor and her husband the income for life, remainder to her daughter after her death. The court said (page 243):

"The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentory in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. * * *"

In *Bingham* v. *United States*, 296 U. S. 211, 216, 80 L. ed. 160, *the Government argues* (page 162, L. ed.): "Life insurance is inherently testamentary in character. The policies herein are particularly so because of the contingent character of the beneficiaries' interest and it is therefore appropriate to include the proceeds thereof in the insured's gross estate.". In rejecting the contention the court said:

"These principles establish that the title and possession of the beneficiary was fixed by the terms of the policies and assignments thereof beyond the power of the assured to affect many years before the act here in question was passed. No interest passed to the beneficiary as the result of the death of the insured. His death merely put an end to the possibility that the predecease of his wife would give a different direction to the payment of the policies."

Over and over again in the line of cases in which the Government was contending for the taxability of transfers in trust where the income was withheld from the beneficiary until after donor's death the claim was advanced that the gifts were testamentary. In *May* v. *Heiner*, 283 U. S. 238, *the Government in its brief in this court* (No. 311, page 7) *used this statement*: "The general characteristics of a testamentary disposition, putting aside matters of form, are that the property go over at the death of the testator and that during his lifetime he have the possession, enjoyment or control."

In *Burnett* v. *Northern Trust Co.*, 283 U. S. 782, and in the *Morsman* case, 283 U. S. 783, the same contention was advanced and again rejected by this court. And in *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, *the Government in its brief* (No. 262, page 19) *said*: "The tax here is upon the transfer of the corpus that was withheld from the beneficiaries until the decedent's death. Accordingly so far as a corpus is concerned, the decedent had no motive associated with his own life. On the contrary it was associated with his death, and this is properly treated as a testamentary disposition. Furthermore, although the court declared evidence was lacking that decedent was actuated by any thought of death, such motive clearly appears from the actual disposition of the corpus to take effect at and not before decedent's death."

Again this court rejected the contention.

The real meaning of the court's use of the term "testamentary" is evidenced in its opinion in the case of *Commissioner* v. *Bullard*, 303 U. S. 297. In that case having just held in *Hassett* v. *Welch*, 303 U. S. 303, that a gift reserving a life estate to donor made prior to the joint resolution of March 3, 1931, was non-taxable, the court went on in the case of *Bullard* v. *Commissioner* (*supra*) to say that

Congress may treat such a gift as testamentary by an act directly taxing it. Said the court (at p. 301, last sentence):

> "• • • A further vindication of the exaction is authority of Congress to treat as testamentary, transfers with reservation of a power or an interest in the donor. The legislative history of the Joint Resolution, to which reference is made in Hassett v. Welch, post, p. 303, decided this day, demonstrates that the purpose of the legislation was to prevent avoidance of estate taxes. As has been said by the Court of Appeals of New York: 'It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is the transfer with reservation of life estate.' • • • As applied to a trust created after its enactment the Joint Resolution does not violate the Fifth Amendment."

Construing the two cases together it is perfectly clear that the court considers such gifts not *per se* testamentary and as in contemplation of death, but that it considers such gifts within the reach of the taxing power of Congress if it specifically designates the gifts as taxable. The indication is very definite that they are not taxable as testamentary gifts under the contemplation of death clause but are taxable if specifically designated by statute. Not only was the gift in this case made prior to the enactment of this joint resolution, but it does not even fall within its terms and so would not be taxable had it been made subsequent to the enactment of such law.

As we have pointed out in our main brief, the essential characteristic of a testamentary gift is that it remains ambulatory until the death of the testator, and that it confers no rights until that time. Nothing whatever passes from the testator until his death. On the other hand, an *inter vivos* gift becomes complete the instant it is made. It passes beyond the power of the donor. It fixes rights. To contend that a gift is in contemplation of death because it is testamentary and that it is testamentary because it with-

holds from the beneficiaries the actual use and enjoyment of the property until donor's death is simply a roundabout way of saying that all gifts *inter vivos* in which the possession and enjoyment is withheld until donor's death are in contemplation of death. That such is not the law we believe we have abundantly demonstrated.

Nor does the fact that one creating an *inter vivos* trust names as beneficiaries thereof the same persons formerly named in his will make the gift testamentary. Every gift must go to some one. It would be equally sound to contend that if the gift is made to someone other than is named in the will it is therefore made as a supplement to the will and to round out and complete it. Testamentary dispositions are not defined by looking to the persons to whom or the manner in which the property is given. If such were the case nearly all *inter vivos* gifts in trust would be held to be testamentary in effect. In the long list of cases cited in our main brief, the beneficiaries of the trust were almost uniformly the same persons who had been provided for by testator's will. But this was never deemed as indicating that the gift was testamentary and therefore in contemplation of death. The Government's argument (Br., pp. 34-38) based on *Milliken* v. *U. S.*, 283 U. S. 15, and *U. S.* v. *Wells*, 283 U. S. 102, depends entirely on the assumption that donor's dominant *motive* in this case was to provide for his beneficiaries after death. That, the Government says, is a testamentary motive. But the Board has found no such motive. Nor is there any evidence from which it could reasonably be inferred that such was the dominant motive. On the contrary the Board found that the gift was not in contemplation of death and clearly indicated its conclusion that fear of the market was the dominant motive. Nor did it infer from the evidence that this desire was a sole or dominating factor contributing to the fear. The human desire to preserve one's property is common to all and is reason enough for putting it in a safe place.

The Government's argument depends on the same false premise, and the same erroneous inferences from the evidence, that are inherent throughout its Brief.

## CONCLUSION.

The Government in its brief has reconstrued the evidence, rejecting the evidence and inferences favorable to the Board's finding and giving weight only to those parts favorable to its legal theory. By confusing intent, motive and purpose, by drawing inferences from the evidence not found there by the Board of Tax Appeals, and by completely disregarding the Board's finding of fact, it attempts to reinterpret the evidence in this court in a manner which was not even suggested to the Board of Tax Appeals.

The only question of law before the Circuit Court of Appeals in this case was whether the fact that the trust instrument on its face provided for an accumulation of the income until after donor's death made the gift *per se* in contemplation of death. In its general finding of fact that the gift was not in contemplation of death the Board of Tax Appeals had disposed of all questions and inferences to be drawn from the evidence. Every question of motive was by this finding decided against the Government. If fear for his property may have been inspired by various motives the Board's finding means that it was not inspired by any motives which would spell contemplation of death. The sole question then is, does this accumulation of the income until after donor's death showing an intent (not a motive) to provide for beneficiaries after donor's death amount to contemplation of death? We have pointed out in our main brief that contemplation of death was a term designed to prevent evasion of the estate tax. If was aimed at those who, deliberately setting out to evade the tax and in expectancy of death, transfer their property for that purpose. It was linked in the statute with the presumption that gifts made within two years of death were in contemplation of

death. It naturally follows that under the principle of *expressio unius est exclusio ulterius*, gifts not made within two years of death are not presumed to be in contemplation of death. The time element was clearly deemed important as bearing on a man's expectancy of death.

A second provision of the statute dealt with the nature of the gift, and provided for the taxation of gifts intended to take effect in possession or enjoyment at or after death. It was clearly the Congressional idea that such gifts were not covered by the prior clause. When this court in *May* v. *Heiner* (*supra*) and later in *McCormick* v. *Burnet* (*supra*) and other cases held that this section only applied where the grantor's interest ceased at death, Congress quickly amended the law (Joint Resolution of March 3, 1931) to provide that if the gift withheld the possession and enjoyment until after donor's death *and* reserved a life interest to the donor the gift would be taxed. This is a clear indication that unless the life income was reserved to the donor it was immaterial whether the use and enjoyment was withheld from the beneficiary until donor's death. The gift simply was not taxable.

During the more than twenty years in which this contemplation of death provision has been in effect, the Treasury regulations have never claimed that either the accumulation of income or the intent to provide for beneficiaries after donor's death as shown by such accumulation made the gift taxable as in contemplation of death. The regulations are the Government's interpretation of the law. As a rule they interpret the statutes in the most favorable light for the revenues reasonably possible. If this intent made a gift taxable, it would have made taxable innumerable cases that have heretofore gone untaxed. During all the twenty years the Government has occasionally feebly advanced this contention in the lower courts, but in most of the cases it abandoned the claim before it reached the Supreme Court. In this particular case, as we pointed out in our main brief, in the original tentative findings by the

Commissioner it was not even claimed that Mr. Hendrie's gift was in contemplation of death. It was merely contended that it was intended to take effect in possession and enjoyment at or after death. In the final deficiency letter the contemplation of death ground was added as an afterthought. The law is well settled that "If doubt exists as to the construction of a taxing statute the doubt should be resolved in favor of the taxpayer." *Hassett* v. *Welch*, 303 U. S. 303; *Gould* v. *Gould*, 245 U. S. 151.

Is it possible in view of this history to say that the statute plainly and clearly creates a conclusive presumption that gifts the enjoyment of which is withheld from the beneficiaries till donor's death are in contemplation of death. We submit that it is not.

Respectfully submitted,

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# MICROCARD

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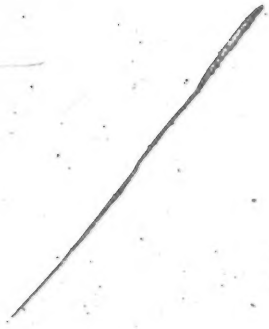


# INDEX



## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 1008

THE COLORADO NATIONAL BANK OF DENVER AND GERTRUDE HENDRIE GRANT, EXECUTORS OF THE ESTATE OF EDWIN B. HENDRIE, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 28–30) is not reported. The opinion of the court below (R. 53–59) is reported in 95 F. (2d) 160.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 31, 1938 (R. 60). A petition

for rehearing was filed by the taxpayer on Ma
1938 (R. 65–67), and was denied April 4,
(R. 69). The petition for a writ of certiora
filed May 2, 1938. The jurisdiction of this
is invoked under Section 240 (a) of the Ju
Code as amended by the Act of February 13,

## QUESTION PRESENTED

Whether there was any evidence to sustai
Board of Tax Appeals in reversing the Co
sioner's determination that the decedent's ir
cable transfer, effected by a declaration of
dated January 7, 1927, was made in contempl
of death within the meaning of Section 302 (
the Revenue Act of 1926, as amended.

## STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are
forth in the Appendix, *infra*, pp. 12–14.

## STATEMENT

The facts were stipulated (R. 35–50), and
summarized and found by the Board of Tax
peals (R. 28–29), as follows:

The decedent, Edwin B. Hendrie, died on J
15, 1932, at the age of 85 years and 6 months.
established a trust on January 7, 1927, when
was 80 years of age. He was then in good hea
The trust was irrevocable. The trust instrum
provided that the income of the trust should be
cumulated during the lifetime of the donor

added to the corpus, that "after the death of the Donor the net income from all of the trust estate, or so much thereof as Gertrude Hendrie Grant, daughter of the Donor may call for, shall be paid to her by the Trustee so long as she shall live" while that not called for should be added to the corpus, and that the corpus was to go to the children of Gertrude Hendrie Grant at her death. The trust contained a provision against anticipation by any beneficiary. (R. 28.)

The decedent discussed with the trust officer of a bank, in the latter part of 1926, the purposes and details of the trust which he proposed to establish. He said he wanted to transfer about one-third of his assets in the interest of his daughter and her heirs so that whatever might happen to his own financial affairs in the future, those persons would be provided for. (R. 29.) He said he desired to retain for himself his more speculative securities and to feel free to speculate with that property during the rest of his life, but to put the other one-third beyond his own reach and risk. He said he desired and intended to "play on the market" to a greater extent and in a more speculative way for the remainder of his life. The only evidence that the daughter or her husband ever knew of the trust is a statement which the decedent made in 1930 to the husband that his (Hendrie's) daughter and grandchildren would be adequately provided for, in the event of his death, through the medium of a trust which he

had created and which would not be affected by his operations on the stock market. It does not appear that the daughter knew the details of the trust prior to her father's death. (R. 29.)

The decedent's will was dated January 26, 1925. It provided that the bulk of his estate should be placed in trust for the benefit of his daughter and her children with remainders to the children. (R. 29.)

On the basis of the foregoing facts, the Board decided in favor of the taxpayer, and the Commissioner thereupon petitioned for review. The court below reversed.

## ARGUMENT

In 1927 the decedent transferred one-third of his property in trust with the proviso that the income therefrom should be accumulated and added to the corpus during his lifetime, and that after his death, the income should be paid to his daughter for life, and thereafter the corpus to her children (R. 28–29). He thereby accomplished the same purpose as he had previously by will in 1925, wherein he had provided that the bulk of his estate should be placed in trust for the benefit of his daughter and her children (R. 29, 47–50). The provisions of the will, dated January 26, 1925 (Ex. G, R. 47–50), and the trust instrument of January 7, 1927 (Ex. B, R. 10–15), are strikingly similar.

The Commissioner determined that the decedent transferred the property in trust in contemplation of death, and therefore he included it

in the latter's gross estate under the provisions of Section 302 (c) of the Revenue Act of 1926, *infra* (R. 8-9, 28). Although recognizing the presumptive correctness of the Commissioner's determination, petitioners contended before the Board that the donor's dominant motive in effecting the trust was connected with life, not with the thought of death (R. 29). The Board, finding that the transfer was not made in contemplation of death, upheld their contention (R. 30).

The court below, however, held that it was clear the decedent had made the transfer in contemplation of death, since his purpose to insure provision for his daughter and her children upon his death, in the event that he lost the balance of his property in the speculations which he was about to undertake, was a purpose desirable to him in the event of his death. To accomplish the result intended, he changed his will, in which he had set up a testamentary trust, and in place thereof made the transfer in trust *in praesenti*. The reason for making the substitution, asserted by the petitioners, is that the decedent desired to speculate. But this was not the reason for making the gift, but only for making it in the form of a trust instead of a will. Since the trust was made in lieu of the will, it was clearly a *pro tanto* substitute for the prior testamentary disposition of the property.

The petitioners contend (Pt. 6) that the holding of the court below is in conflict with holdings of this Court and of other Circuit Courts of Appeals in *Shukert* v. *Allen*, 273 U. S. 545; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*,

281 U. S. 238; *Becker* v. *St. Louis Union Trust*
296 U. S. 48; *Commissioner* v. *McCormick*, 43
(2d) 277 (C. C. A. 7th), *rev'd*, 283 U. S. 784,
*Welch* v. *Hasset*, 90 F. (2d) 833 (C. C. A. 1st), *af*
302 U. S. —, because in those cases, petitioners c
tend, it was held that postponement of the ben
ciaries' use and enjoyment did not make the gi
there in question taxable under that portion of
Section requiring the inclusion in the decedent
gross estate of transfers made to take effect in p
session or enjoyment at or after death.

It should suffice in answer to point out that t
decision below did not proceed upon that basis, b
upon the basis that the evidence conclusively esta
lished the decedent had his death in mind, in th
the generating motive for the transfer was not or
to provide for his daughter and her children at h
death, but to *insure* that such provision would
made for them at that time. The tax upon t
transfer was not sought to be justified below, a
is not sought to be justified here, because the ben
ficiaries' right to the use of the income was wit
held or postponed during the decedent's lifetim
but because the nature of the transfer and th
motive which actuated it compelled the conclusio
that the transfer was made in contemplation o
death. The decedent's desire to speculate fre
from the danger of being unable, as a result thereo
to provide for his daughter and her children at h
death was merely the occasion or circumstanc

which led him to such contemplation, and not the motive for making provision for his daughter and her children.

Nothing that was said in *United States* v. *Wells*, 283 U. S. 102, justifies a contrary view. That case stands for the simple proposition that, acting within the scope of its obvious powers, Congress provided that *inter vivos* transfers made in contemplation of death should be included in the gross estate in order to prevent tax avoidance by a resort to mere substitutes for testamentary dispositions. As the Court said in that case (p. 116):

> The dominant purpose [of the statute] is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax.

Thus the definition of "in contemplation of death", as used in the statute, is not to be restricted to the state of mind of one who makes a transfer in fear of impending death, either as a result of old age or illness, but includes as well the state of mind of one who makes a testamentary disposition, and hence one who makes a substitute therefor, wholly irrespective of his age or state of health. If a testamentary disposition is defined as one intended to provide for the objects of the testator's bounty at death, then clearly a substitute therefor is one which is intended to accomplish the same purpose, even though title is presently transferred.

It follows that, if we are here dealing with such a substitute, it falls within the statute; and we sub-

mit that there can be little doubt that we are. T
most cursory consideration of the context of t
transfer here leaves no doubt on that score. F
aside from the fact that it reproduced the de
dent's previous testamentary trust, it was obviou
intended, just as that trust had been, to make p
vision for the natural objects of his bounty at
death. The existence of the testamentary pu
pose for the transfer would therefore appear to
beyond dispute, even if the decedent had not e
pressly stated that his purpose was to insure pr
vision for his daughter and her children at h
death (R. 29). If the *Wells* case teaches, as w
understand it does, that the trier of the fact mu
ascertain the manifest purpose of the transf
and, having done so, give effect to th
purpose, it necessarily follows that the Board
decision was in error. For it mistook the me
circumstance or occasion which gave rise to a reco
sideration of the means which would most certain
accomplish the decedent's purpose, in the situatio
then facing him, for the motive which induced hi
to make provision for his daughter and her chi
dren, namely, to insure them a competence at h
death. The result was that the Board considere
the decedent's health, and the fact that he was no
in fear of impending death, controlling. It is pr
cisely this error which the court below correcte

It is well settled that a gift is made in contem
plation of death where the donor's dominant motiv

is to make proper provision for his dependents after his death. See *Igleheart* v. *Commissioner*, 77 F. (2d) 704 (C. C. A. 5th); *Updike* v. *Commissioner*, 88 F. (2d) 807 (C. C. A. 8th). Or, as stated by the court below (R. 57), a transfer motivated by the same considerations as those which prompt testamentary disposition of property before death will support the tax. *United States* v. *Wells*, *supra*; *Heiner* v. *Donnan*, 285 U. S. 312; *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48; *Willcuts* v. *Stoltze*, 73 F. (2d) 868 (C. C. A. 8th); *Igleheart* v. *Commissioner*, *supra*. Since the generating motive for the transfer here in question—namely, presently to make sure provision for his daughter and her children at his death against the possibility that losses resulting from the speculation he was about to undertake might otherwise leave him unable to do so at that time—was beyond peradventure one associated with death, it follows that it was made in contemplation of death within the meaning of the statute (*United States* v. *Wells*, *supra*; *Igleheart* v. *Commissioner*, *supra*; *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. (2d) 916 (C. C. A. 2d), certiorari denied, 293 U. S. 565), as the court below properly held (R. 58–59).

It is therefore clear that the court below did not err or exceed its powers in setting aside the Board's finding that the transfer was not made in contemplation of death, for such finding was not

supported by any substantial evidence. The facts were stipulated (R. 35–38), and the pertinent facts were covered by the Board's findings set forth in the opinion as stipulated (R. 28–29). Their sufficiency to support the Board's decision raised a question of law reviewable by the court below. *Helvering* v. *Rankin*, 295 U. S. 123; *Kaufmann* v. *Commissioner*, 44 F. (2d) 144 (C. C. A. 3d); *St. Paul Abstract Co.* v. *Commissioner*, 32 F. (2d) 225, 226 (C. C. A. 8th); *Norfolk Nat. Bank of C. and T.* v. *Commissioner*, 66 F. (2d) 48 (C. C. A. 4th). For whether there is any substantial evidence to support the Board's finding is a question of law. *Folk* v. *Commissioner*, 67 F. (2d) 779 (C. C. A. 10th). The court below did not weigh the evidence or make its own findings as was done by the appellate court in *McCaughn* v. *Real Estate Co.*, 297 U. S. 606. It was clearly within the province of the court below to determine whether there was any evidence to support the Board's finding and to set it aside if unsupported. *Champlin* v. *Commissioner*, 71 F. (2d) 23 (C. C. A. 10th). It did so only because, upon a complete review of the evidence (R. 55–56), it failed "to find any substantial evidence that the transfer under consideration was not made in contemplation of death within the meaning of the statute" (R. 59). This disposes of the petitioners' contention (Br. 24–27) that the court below exceeded its power in overturning the Board's finding.

## CONCLUSION

It is, therefore, respectfully submitted that the decision of the court below is not in conflict with either the applicable decisions of this Court or those of other Circuit Courts of Appeals, and that the court below committed no error in reversing the decision of the Board of Tax Appeals on the facts in the case. The petition should, therefore, be denied.

ROBERT H. JACKSON,
*Solicitor General.*
JAMES W. MORRIS,
*Assistant Attorney General.*
SEWALL KEY,
CARLTON FOX,
S. DEE HANSON,
*Special Assistants to the Attorney General.*

MAY 1938.

## APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * (U. S. C., Title 26, Section 411).

Pub. Res. No. 131, approved March 3, 1931, c. 454, Stat. 1516:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from,

the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth." (U. S. C., Title 26, Sec. 411.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the mean-

ing of this title." (U. S. C., Title 26, Section 411.)

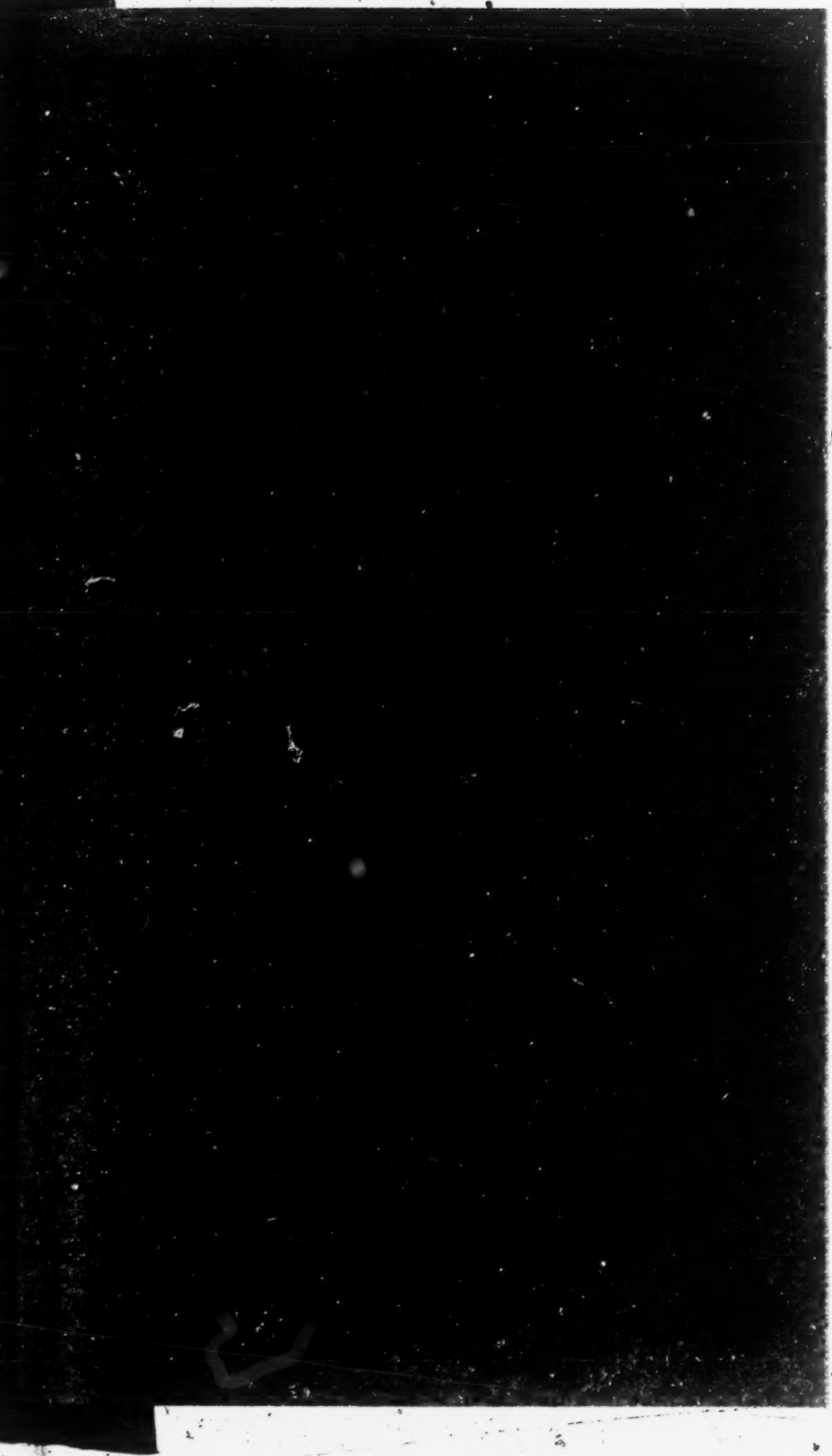
Treasury Regulations 80 (1934 Ed.):

ART. 16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

A transfer in contemplation of death is a disposition of property prompted by the thought of death. The phrase "contemplation of death" as used in the statute is not limited to contemplation of imminent death or to an apprehension that death is near at hand. Death must be "contemplated," that is, the motive which induces the transfer must be such that leads to testamentary disposition. A gift inter vivos which springs from a motive essentially associated with life rather than with death is not made in contemplation of death.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1939



# INDEX



## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 30

THE COLORADO NATIONAL BANK OF DENVER AND GERTRUDE HENDRIE GRANT, EXECUTORS OF THE ESTATE OF EDWIN B. HENDRIE, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 26–28) is not reported. The opinion of the court below (R. 49–55) is reported in 95 F. (2d) 160.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 31, 1938 (R. 55). A petition

for rehearing was filed by the taxpayer on March 1, 1938 (R. 56), and was denied April 4, 1938 (R. 58). The petition for a writ of certiorari was filed May 2, 1938. (R. 59.) Certiorari was granted May 31, 1938. (R. 59.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether there was any evidence to sustain the Board of Tax Appeals in reversing the Commissioner's determination that the decedent's irrevocable transfer, effected by a declaration of trust dated January 7, 1927, was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 41–43.

## STATEMENT

The facts were stipulated. No witnesses were called before the Board. There was a general stipulation (R. 33–37) of the formal facts, namely (so far as material here), that the decedent died on July 15, 1932, at the age of eighty-five years and six months (R. 33); that on January 7, 1927 (R. 35), he established the trust in question, Exhibit C, attached to the stipulation (R. 9, 37), and,

finally (R. 36), that the decedent had theretofore executed a will, which is also attached to the stipulation, as Exhibit G (R. 44–48).

The transfer in trust provided *inter alia* that the income should be accumulated "during the lifetime of the Donor"; that "after the death of the Donor," so much of the income as the decedent's daughter called for should be distributed to her; that "after the death of the Donor," so much of the income as she should not call for should be added to the principal (R. 11), and that the corpus should be distributed upon her death to the decedent's grandchildren and their descendants (R. 11). The trust further provided as follows (R. 11):

> Third: No title in any part of the trust estate hereby created or in the income accruing therefrom or in its accumulations, shall vest in any beneficiary hereunder during the continuance of the trust as to such beneficiary, and no beneficiary shall have the right or power to transfer, assign, anticipate or encumber his or her interest in said trust estate or the income therefrom prior to the actual distribution thereof by the Trustee to such beneficiary.

The will had been executed January 26, 1925 (R. 47). After making certain relatively small bequests, the decedent had devised and bequeathed the residue of his estate to the petitioners in trust for the benefit of his daughter and grandchildren, and their descendants, upon substantially the same

terms as those of the trust here in question (R. 45–46).

By further separate stipulations, it was stipulated that if certain witnesses were called by the petitioners, they would testify (so far as material here) as follows:

That J. E. Kinney, a physician of Denver, Colorado (R. 37), would testify that he had been the family physician of the decedent over a period of years; was consulted by him on July 11, 1927, at which time the decedent gave him a history of no illness except occasional slight attacks of rheumatism; that his appetite was good; that he slept well and that he had no pains or symptoms of trouble anywhere; that the decedent came to be checked up periodically and that on the date of the examination stated he was eighty years and six months of age and that his physical and mental conditions were much better than the average of persons of his age; that the decedent died on July 15, 1932; that he had never seen any evidence of any disease or abnormal conditions in the decedent until several years after the examination of July 11, 1927; that at no time during his acquaintance with the decedent did he indicate any fear or expectancy of death, but at all times spoke of plans for business activities, trips and other matters connected with his current life, and that the primary cause of death was acute pyelonephritis. (R. 38–39.)

That Frank N. Bancroft, attorney at law, Denver, Colorado (R. 39), would testify that in the fall

of 1926 and in the winter of 1926-27, he was the trust officer of the petitioner Colorado National Bank of Denver (R. 40); that in the latter part of 1926, the decedent had been considering for a considerable period of time how he might best transfer a part of his estate in the interest of his daughter, and her descendants and for her heirs; so that whatever might happen to his own financial affairs in the future, such persons would be provided for; that the decedent had discussed with him the present and future needs of his daughter and her children, the character of securities that he desired to put into the trust, and what sort of provisions should be made to protect these securities and yet provide for his daughter and her children; that the amount which he wished to place in trust constituted about one-third of his then fortune and would be made up of securities of the more stable sort which required the least attention; that several drafts of trust agreements were submitted to the decedent and discussed; that the decedent expressed at many of the meetings between them the thought that after he made this trust agreement, he would then have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish and that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in the trust deed and thereby put it entirely beyond his own power otherwise to dispose of the same contrary to the provisions of

the trust deed and to remove it from the vicissitudes of speculations; that the decedent expressed a desire to "play on the market" more actively and in a more speculative way than in the par ; that he often spoke of his intention of thus occupying himself for the rest of his life, giving less time to his business; that the decedent at al times indicated that his thought was how to word the trust agreement so that whatever might happen to him financially in the future and in respect to his remaining fortune, the corpus of the trust would in no wise be jeopardised thereby, nor its disposition in the manner provided for in the trust deed prevented; that during this period the decedent appeared in good health, was actively managing his own affairs and during the discussions mentioned did not indicate he entertained any thought of impending death or that he expected his death within the immediate or reasonably near future, nor did he discuss the problem of avoidance of death or inheritance taxes or any problems as to the disposition of the rest of his fortune. (R. 41–32.)

That W. W. Grant, the son-in-law of the decedent (R. 42), would testify that he knew the decedent intimately through almost daily association since 1910 and was more or less familiar with his business affairs; that he appeared in excellent health and spirits up to within a few months of the date of his death and until the last year of his life spent each winter in California, going and return-

g by himself; that he was in the habit of specu-
ting on a considerable scale, particularly during
st five years of his life, and that one time the
cedent stated to him that his daughter and grand-
ildren would be adequately provided for in the
ent of his death through the medium of a trust
hich he had created, regardless of his operations
the stock exchange; that he first learned of the
st in 1930 when the decedent made the statement
ove mentioned; that up until six months of the
te of his death, the decedent took regular daily
ercise by means of walks, setting up exercises
d occasional games of golf and read market re-
rts and services up until his last illness, all the
e maintaining and expressing a lively interest
the future trend of American business and
arkets. (R. 43–44.)

This constituted all of the evidence in the case.

The Commissioner determined that the transfer
question was made in contemplation of death,
cluded in the gross estate the value of the prop-
ty transferred (R. 8) and accordingly deter-
ined a deficiency in the tax in the sum of $188,-
8.28 (R. 8).

The Board disposed of the case in a memoran-
um opinion (R. 26–28). It made no special find-
gs, but after stating the formal facts as stipu-
ted (R. 26–27), summarized the testimony given
bove (R. 27) and then turned to a discussion of
he legal phases of the case. The Board said that
he petitioners had the burden of proof to show

that the transfer was not made in contemplati
of death; that they recognized this and contend
the evidence showed affirmatively that the do
nant motive in the mind of the donor was c
nected with life, not with death, saying their po
was that he made the transfer so that he wo
be free to speculate on the stock market for
rest of his life without fear that loss of his fort
would leave nothing for his daughter and her c
dren; and that the petitioners pointed out that
decedent made a complete gift and retained
possession or enjoyment in himself. The bo
then mentioned that the Commissioner relied u
the fact that the income was to be accumulated
added to corpus during the life of the decedent
consequently the beneficiaries were to receive n
ing until after his death, saying that the Com
sioner argued from this circumstance that
transfer was a substitute for testamentary disp
tion made in contemplation of death. (R. 27–

After thus stating the contentions of the par
the Board immediately proceeded to a summ
disposition of the case upon the basis of its co
sion as follows (R. 28).:

> We think the transfer was not made in
> templation of death within the meanin
> the statute as explained in *United S*
> v. *Wells*, 283 U. S. 102. Principles
> nounced in the cases above listed control
> case which is not distinguishable from
> or more of those cases where, as here

come was to be accumulated until after the death of the donor.[1] Therefore, on this point we hold for the petitioners.

The court below, in a two to one decision (R. 49-55), disagreed with the conclusion of the Board. The court stated the facts substantially in the terms of the stipulations, just as the Board had done, although its statement is somewhat fuller than that made by the Board. The court reversed the Board's decision because, as it stated, it failed to find any substantial evidence that the transfer under consideration was not made in contemplation of death within the meaning of the statute. (R. 55.) The basis for this conclusion is that (R. 54):

> The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that

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[1] The cases referred to are *Shukert* v. *Allen*, 273 U. S. 545; *McCormick* v. *Burnet*, 283 U. S. 784; *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; and *Klein* v. *United States*, 283 U. S. 231.

certainty was gratified by the transfer. The purpose was a commendable one, but the generating motive for a transfer made in such circumstances is associated with death. It follows that the transfer was made in contemplation of death within the meaning of the statute, though decedent was in sound health of body and mind and did not entertain thought of death immediately or in the near future.

## SUMMARY OF ARGUMENT

1. Not only the court below but the Board as well treated the question here as one purely of law. The Board's decision rests upon two conclusions of law, (1) that under its interpretation of *United States* v. *Wells*, 283 U. S. 102, the declared motive of the decedent is to be classified as one associated with life, and (2) that the fact that the decedent provided for the accumulation of the income during his lifetime is immaterial.

The burden which rests upon the petitioners to show that the transfer was not made in contemplation of death is not sustained merely by showing that the decedent was not motivated by fear of impending death or by a desire to avoid estate taxes. In order to maintain their challenge it is necessary for them to show affirmatively that the purpose to be subserved was associated with life rather than with death. The Government contends that, in view of the fact that the undisputed evidence shows that the decedent intended by the transfer to make

sure provision for his daughter and her children after his death, the case turns solely upon the classification of the assigned motive. Consequently, if there was error by the court below, it consisted not in reversing a fact finding, but in wrongly classifying the decedent's motive. We submit that the classification made by the court below was correct.

2. The court below rested its decision upon the premise that the decedent's purpose was "to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death," and that this was a purpose associated with death and not with life under the decisions of this Court (R. 54).

There is no basis for the petitioners' contention that the decision below rested solely upon the fact that by the terms of the transfer the income was to be accumulated during the decedent's lifetime. The court looked to the terms of the transfer merely in order to see whether the decedent had carried out his avowed purpose to make sure provision for his daughter and her children after his death. It committed no error in so doing.

3. The petitioners' contention regarding the classification of the decedent's purpose is two-fold:

(a) That "fear of the market" was the "pro
mate" cause for the transfer, the desire to prov
for his daughter and her children after his de
being merely the "contributing" cause (Br.
and incidentally, that the purpose to preserve
property in order to make provision for the obj
of his bounty after death could not have b
achieved by testamentary disposition (Br.
(b) That, in any event, the purpose to provide
the objects of his bounty after death is immate
(Br. 11-47); that "The transfer must be brou
about by fear or thought of death arising f
bodily or mental conditions conducive theret
usually ill health" (Br. 46).

(a) The petitioners give no reason why the c
should separate the motive into its component p
and none for their assertion that fear of the ma
was the proximate cause for the transfer, and
desire to provide for his daughter and her chil
after death merely the contributing cause.
though admitting that the latter desire was on
the causes for the transfer, they fail to recog
that the decedent's purpose to protect his prop
against consequences of possible losses in his
market speculations is merely the connecting
between his fear of the market and his desi
make sure provision for his daughter and her
dren after his death. The elements of the m
are inextricably interwoven. A breakdown o
motive into its component parts is wholly wit

justification. The transfer was a mere substitute *pro tanto* for the disposition he had previously made by will and was made for the same purpose. The mere method of expressing it cannot be the basis for classification. The fact that the preservation of the property during his life, in order to assure certain provision for the objects of bounty at death, could not have been achieved by testamentary disposition does not affect either the character or quality of the controlling purpose. The transfer was merely a means of assuring the accomplishment of that purpose and the very fact that it was used demonstrates the decedent's determination that it should be accomplished.

There is no analogy in this respect between the case at bar and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48. In that case, the Court held that evidence of any motive to provide for children at death was wholly absent, the decedent's only purposes being to make his children independent and to avoid high surtaxes during his lifetime, whereas in this case the avowed purpose of providing for the daughter and grandchildren at his death is admittedly present. The cases are similar only in the circumstance that the appellate court in the *Becker* case, having found no evidence to sustain the finding of the District Court treated the question as a matter of law and reversed the decision of the District Court. Here, likewise, the Circuit Court of Appeals, having found, under the correct

interpretation of the *Wells* case, no evidence to sustain the decision of the Board, treated the question as a matter of law and reversed the Board.

(b) The contention that a purpose to provide for objects of bounty at death is not a death purpose appears to us to run counter to the principles announced by this Court. The petitioners suggest no other motive which is testamentary in character or of a "sort which leads to testamentary disposition," except "fear or thought of death arising from bodily or mental conditions conducive thereto—usually ill health" (Br. 46), and the purpose to avoid estate taxes (Br. 10).

Nor is there any analogy here between the case at bar and the *Becker* case. There is an obvious difference between a purpose to make children independent during the donor's lifetime or a purpose to avoid high surtaxes and a purpose to provide for children at death. But there is no substantial difference between a purpose to provide for objects of bounty at death and a purpose to conserve property against casualty in order to insure the effectiveness of such provision. The latter merely indicates a more careful and detailed consideration of the practical methods necessary to achieve an effective provision for the children. It indicates a fixed determination to accomplish it.

The decedent's impelling, controlling, inducing, actuating, dominating motive for the transfer was to provide for his daughter and her children after

his death. That was the reason, and the only reason, for conserving the property. The transfer was a substitute pro tanto for the will he had previously made. He made the substitution without awaiting death because to have awaited death might have defeated his purpose. Hence the transfer was motivated by the same considerations which lead to testamentary disposition—the motive therefor was of a sort which leads to testamentary disposition. This purpose is not obscured by the fact that the method of accomplishing it permitted the decedent during his latter years to indulge in security speculation without concern that misfortune in such ventures might leave his daughter and grandchildren unprovided for after his death.

## ARGUMENT

### THERE WAS NO EVIDENCE TO SUSTAIN THE BOARD OF TAX APPEALS IN REVERSING THE COMMISSIONER'S DETERMINATION THAT THE DECEDENT'S IRREVOCABLE TRANSFER, EFFECTED BY DECLARATION OF TRUST DATED JANUARY 7, 1927, WAS MADE IN CONTEMPLATION OF DEATH WITHIN THE MEANING OF SECTION 302 (c) OF THE REVENUE ACT OF 1926, AS AMENDED

The petitioners make three contentions. We state them in the order in which we shall discuss them. (1) That the court below overturned a determination of fact made by the Board that the transfer in question was not made in contempla-

tion of death (Br. 16–19); (2) that the court below erred in holding an irrevocable trust to be in contemplation of death as a matter of law, even though it contained no reservation of income to the donor, merely because it provided for an accumulation of income until after the donor's death, thereby preventing the beneficiaries from receiving it until that time; (3) that the court below erred in holding that the decedent's purpose to preserve the property from danger of his intended stock market speculations, in order to be certain that his daughter and her children should be provided for after his death, was "testamentary" and in contemplation of death (Br. 44–47).

(1) *The court below did not overturn a determination of fact made by the Board*

The petitioners' first contention is that the conclusion of the Board that the transfer in question was not made in contemplation of death was one of fact and that the court below improperly reversed it. Hence we have stated the question to be whether there was any evidence to sustain the Board in reversing the Commissioner's determination that the transfer was made in contemplation of death. It might otherwise be stated to be: Whether the Board applied the proper rule of law to the undisputed facts; that is, whether it correctly interpreted the decisions of this Court, particularly that in the case of *United States* v. *Wells*,

283 U. S. 102, and correctly applies its principles to the stipulated facts of this case.

It will be noted that not only the court below, but the Board as well, treated the question as one purely of law. The Board made no special findings. Unless its statement of the formal facts regarding the decedent's age and health and the dates of the execution of the will, the trust in question, and his death are to be regarded as formal findings, it made no findings of fact whatever. It made no finding as to motive, but only related the discussions the decedent had had with the trust officer of the petitioner Colorado National Bank of Denver and the statement he had made to his son-in-law in regard to the purposes of the trust. The Board did not even find (except inferentially) that the transfer was not made in fear of impending death, or that it was not made to avoid the tax. Indeed, in arriving at its conclusion that the transfer was not made in contemplation of death, it contented itself with stating the contentions of the parties and disposing of them by its conclusions that (R. 28):

> We think the transfer was not made in contemplation of death within the meaning of the statute as explained in *United States* v. *Wells*, 283 U. S. 102.

and that—

> Principles announced in the cases above listed control this case which is not distin-

> guishable from one or more of those cases where, as here, income was to be accumulated until after the death of the donor. Therefore, on this point we hold for the petitioners.[*]

It therefore seems clear that the Board's decision rests upon two conclusions of law, first, that under its interpretation of the *Wells* case, the motive of the decedent is to be classified as one associated with life, and second, that the fact that the decedent provided for the accumulation of the income until after his death is immaterial.

The petitioners seek to buttress their contention that the Board decided a question of fact upon which its decision is conclusive by pointing out that, though the decedent was eighty years of age when he made the transfer, he was in good health and, generally speaking, contemplated activities evidencing an expectancy of continued life. They also advert to the fact that there is no claim or evidence that the transfer was made in order to avoid estate taxes. But, as this Court pointed out in the *Wells* case, the statutory concept "transfers made in contemplation of death" is not to be restricted to those induced by a condition causing expectation of death in the near future, and expectation of imminent death is not the final criterion. In the language of the Court (p. 118):

[*] The cases referred to are cited in footnote 1, *supra*, p. 9.

> The words "in contemplation of death" mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is "near at hand."

We submit that the same principle applies to the purpose to avoid the tax. While there can be no question, we think, that a transfer made for the purpose of avoiding the tax is made in contemplation of death, this also is not the final criterion. Indeed, there was no contention made below, and there is no contention made here, that the transfer was made either in fear of impending death or for the purpose of avoiding the tax. It may be conceded that it was for neither purpose. But a mere showing that neither of these motives was present does not satisfy the burden resting upon the petitioners to show that it was not made in contemplation of death. We submit that under the principles laid down in the *Wells* case, it is necessary in all cases for the decedent's representatives to show that the moving cause for the transfer, and the purpose to be subserved thereby, were associated with life and not with death. The respondent's contention below was, and it is here, that

the petitioners have failed to sustain that burden; that inasmuch as the stipulated evidence shows the purpose to provide for the daughter and her children after the decedent's death the petitioners have failed to show the administrative determination to be in error, and that consequently this case turns solely upon the legal classification of the decedent's motive. Obviously both the Board and the majority of the court below considered the question one solely of law. Nor is the dissent in the court below based upon a different ground. The dissent states (R. 35) that the transfer was made "In order that he might speculate upon the stock market for the remainder of his life more actively than he had in the past without fear that the part of his fortune thus given might be lost," and that the decedent manifested no other intent and purpose in that respect. But this statement merely fails to recognize the legal significance under the *Welle* case of the decedent's avowed purpose to provide for his daughter and her children after his death. Surely if the Board had found the motive to have been merely the limited one stated by the dissenting judge, the respondent would have had just cause to complain that the finding was contrary to the undisputed evidence. We submit that this case may not properly be disposed of on any view of the evidence which fails to give effect to the avowed purpose of the decedent in its entirety.

hatever error the court below may have com-
ed, it did not reverse a finding of fact. If the
t below committed error, it lies solely in the
rpretation which it placed upon the decisions
his Court in the cases above cited, and particu-
y the interpretation which it placed upon the
ision in the *Wells* case. None of the cases cited
the petitioners (Br. 16–19) is to the contrary.'

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Of the cases cited and relied upon by the petitioners in
port of their contention only *McCaughn* v. *Real Estate*
, 297 U. S. 606, need detain us. The Court there said
t the ultimate question for decision by the trial court in
ury-waived case was one of fact and its general verdict
conclusive, and that the verdict in question was reached
a result of the trial court's conclusion, that although the
nsfer was not made "under any consciousness or belief or
prehension that death was imminent," "the plaintiffs have
led to show that the motive that induced this transfer,
atever it was, was of the sort which leads to testamentary
position, and, consequently have failed to meet the burden
proof placed upon them by the statute" (p. 607). The mo-
e which the plaintiffs assigned for the transfer was the de-
dent's purpose to conserve the principal of the estate for
s children. If the establishment of this motive was not
fficient to overcome the presumption nothing disclosed by
e evidence in that case would have done so, for (as here)
ere was not a single circumstance that did not support the
resumption. Thus in ultimate analysis, the decisive factor
that case was the classification of the motive. However,
nce the decision of the trial court was in the Government's
avor, it sufficed in the circumstances to base the reversal of
he Circuit Court of Appeals upon the ground that there
as evidence before the trial court to sustain the finding.

(Footnote continued on next page.)

We turn then to a consideration of the petitioners' next contention, that the court below erred in holding an irrevocable trust with no reservation of income to the donor to be, as a matter of law, a disposition in contemplation of death merely because it prevents the beneficiaries from receiving the income during the donor's lifetime by providing for an accumulation of income until the donor's death. Our answer is that this is not the basis of the lower court's decision. We think it clear that the basis of the decision is that the undisputed evidence shows the decedent's avowed purpose to have been to provide for his daughter and her children at or after his death by means of a present transfer which placed a part of his property in a situation where it could not be affected by his speculations, and that this is a purpose associated with death within the meaning of the *Wells* case. The court below looked to the trust merely to see whether the decedent had actually carried out that purpose. The second point in argument is therefore stated in these terms.

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It was not necessary for the Court to delve deeper into the case in order to ascertain whether the evidence would have sustained a contrary finding. It would have been necessary to do so only if the trial court had found in favor of the plaintiffs. We believe that in such case a reversal would have been required for there was no evidence to sustain such a finding. However, since the Court found it unnecessary to consider that question in the *McCaughn* case, that case is clearly not controlling here.

(2) *The basis of the court's decision is that the undisputed evidence shows the decedent avowedly was motivated in making the trust by a purpose to provide for his daughter and her children at or after his death and that such motive is one associated with death within the meaning of the Wells case.*

The opinion of the court below discloses that the court rested its decision upon the premise that under the *Wells* case, as well as under the decisions of this Court in *Heiner* v. *Donnan*, 285 U. S. 312, and *Becker* v. *St. Louis Union Trust Co.*, *supra*, and the decision of the Circuit Court of Appeals for the Eighth Circuit in *Willcuts* v. *Stoltze*, 73 F. (2d) 868, and that of the Circuit Court of Appeals for the Fifth Circuit in *Igleheart* v. *Commissioner*, 77 F. (2d) 704 (R. 53), the decedent's motive was associated with death. The court below said (R. 52–53):

> The test lies in the motive for the transfer. If the generating source of the motive is associated with life, the transfer is not made in contemplation of death. But if the generating inducement is associated with death, either immediate or distant, the transfer is made in such contemplation. A gift is made in contemplation of death where the dominant motive of the donor is to make proper provision for the object of his bounty after the death of the donor. Stated, otherwise, it is sufficient to support the tax if the

transfer is motivated by the same considerations as those which prompt testamentary disposition of property without awaiting death.

The court then turned to the decedent's declarations of purposes made to the trust officer of the petitioner Colorado National Bank of Denver. He had said that he desired to make the transfer in the interests of his daughter and her children so that they would be provided for whatever might happen to his financial affairs in the future. He had requested that the instrument should be so worded that whatever might happen to him financially in respect of his reserved property, provision would be made for his daughter and her heirs. The court also adverted to discussions of the decedent and the trust officer as to the kind of provisions which should be included in the instrument to protect his securities, and yet provide for his daughter and her children, and to the statement which the decedent made to his son-in-law that, regardless of his operations on the stock exchange, in the event of his death, his daughter and grandchildren would be adequately provided for through the trust which had been established. The court pointed out that the trust instrument was not designed to provide for his daughter and her children during his lifetime; that under its provisions, none of the property nor the increment thereto was to reach them until after his death,

rther that it was not designed to enable him
gage in speculation; that he could have done
nfettered and unrestricted without the estab-
ent of the trust.

e court then stated, in its own language, what
decedent's avowed motive was. It said (R.

> The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that certainty was gratified by the transfer.

n view of these statements by the court below
s evident that there is no basis for the conten-
n that the decision of the lower court rests solely
on the fact that by the terms of the transfer the
come was to be accumulated during the deced-
t's lifetime and added to the corpus. It would
em rather that the court looked to the terms of
e transfer merely to see whether the decedent
d carried out his avowed purpose.

There is no basis for the contention that the court below should not in these circumstances have looked to the trust. Surely the dicta in *Shukert* v. *Allen*, *supra*, *May* v. *Heiner*, 281 U. S. 238, and *Reinecke* v. *Northern Trust Co.*, *supra*, do not lay down such a doctrine. Nor does the decision in *Becker* v. *St. Louis Union Trust Co.*, *supra*. The effect of these dicta and decision is merely that the fact the transfer contained provisions for the distribution of the property at or after death is not alone sufficient to show that the actuating purpose for the transfer was to provide for the objects of bounty at death, and the disposition, consequently, in contemplation of death. In *Shukert* v. *Allen*, *May* v. *Heiner*, and *Reinecke* v. *Northern Trust Co.*, the motives did not appear at all. No contention was made in those cases that the transfer was in contemplation of death. In the *Becker* case, the Court said that two life purposes were shown to have motivated the decedent: (1) To make his children independent during his lifetime, and (2) to avoid high surtaxes on his income. The Court stated the provisions of the trust, doubtless to demonstrate that it was so drawn as actually to accomplish those purposes. If the trust had not been so drawn, but had provided instead, as in this case, for the accumulation of the income during the decedent's lifetime for the benefit of the beneficiaries after his death, the Court could hardly have held, as it did, that there was no

vidence to conflict with the finding that the hought of death was wholly lacking. We submit hat these cases do not hold either expressly or by mplication that the provisions of the trust have no ignificance whatever in determining the legal uality of the intention.

It seems beyond dispute that the basis of the decision of the court below is that the undisputed evidence disclosed the decedent's avowed motive to have been to accomplish his purpose to provide for his daughter and her children after his death, that such a motive is associated with death. By the same token, the decision below does not rest merely upon the narrow ground that the decedent had provided for the accumulation of the income during his lifetime.

This brings us to the petitioners' third and last point, that the decedent's avowed purpose was one associated with life.

(3) *The transfer was motivated by a death purpose*

The petitioners' contention regarding the classification of the decedent's purpose is two-fold: (a) That "fear of the market" was the "proximate" cause for the transfer, and the desire to provide for his daughter and her children after his death merely the "contributing" cause (Br. 47); and incidentally, that such "contributing" purpose could not have been achieved by testamentary disposition (Br. 11). (b) That, in any event, the purpose to provide for the objects of his bounty after death

is immaterial (Br. 11–47); that to bring the transfer within the statute it must appear that it was "brought about by fear or thought of death arising from bodily or mental conditions conducive thereto—usually ill health." (Br. 46.)

(a) The first of these contentions appears to be the primary basis for the petitioners' assertion that "The gift was clearly in contemplation of the dangers of speculation and not in contemplation of death," (Br. 10) and that "His motive of avoiding loss in the stock market was one definitely associated with life and clearly indicates a definite concern connected with his future activities" (Br. 47). An attempt is made to buttress this first contention by pointing out incidentally that the preservation of the decedent's property in order to make provision for the objects of his bounty after death could not have been achieved by a testamentary disposition (Br. 11, 45).

The petitioners state no justification for separating the motive into its component parts, and none for the assertion that fear of the market was the proximate and the desire to provide for his daughter and her children after death merely the contributing cause for the transfer.[4] The petitioners' argument ignores the evident connection between the decedent's fear of the market and his

[4] It is to be observed that although the petitioners admit the existence of the purpose to provide for the objects of the decedent's bounty at death, the dissent in the court below entirely ignores it.

desire to provide for the objects of his bounty after death. It is obvious from the entire transaction that his purpose in protecting his property against the hazards of his intended speculation in securities was merely an incident in the accomplishment of his purpose to make sure provision for his daughter and her children after his death.

We have here but a single motive, to provide for his daughter and her children, not during the remainder of his life, but after his death, and despite any possible adverse turn of his fortune. The elements of this motive are inextricably interwoven. Any effort to break it down into its component parts is wholly without justification. There is no evidence upon the basis of which such breakdown is justified and the petitioners suggest no reasons for doing so.

The situation disclosed by the undisputed evidence is that the decedent had made a will by the terms of which he had devised and bequeathed all of his property to the petitioners in trust for the benefit of his daughter and her children upon substantially the same terms as those of the trust here in question. His determination thereafter to speculate more freely caused him to consider the effect such speculation might have upon the provisions he had theretofore made for them by his will and to realise that such provisions might not be adequate to carry out the purpose of his will and that it would be necessary, if he were to be certain to accomplish that purpose, to

find a different and safer method of doing so. This review of the situation in the light of his intended speculation led him to a determination to make an immediate transfer in trust of a portion of his property. Clearly such transfer was a substitute *pro tanto* for the disposition he had theretofore made by his will. It was made in place and stead of some of the will's provisions and the purpose which induced it was precisely the same purpose which had led him originally to make the testamentary disposition. It seems to us that it can make no difference whether we say that the decedent's purpose was to protect his property against the vicissitudes of speculation in order to insure provision for the objects of his bounty after death, or that his purpose was to make provision for them after his death by so arranging his present transfer as to insure that the provision made for them could not be affected by such speculation. Surely the manner of expressing the purpose cannot be made the basis for classification. It seems abundantly clear that the ultimate purpose of the transfer was to make such provision. There is nothing whatsoever in the evidence to show that if it had not been for that purpose, the decedent would have made the transfer at all. It cannot be said upon the basis of any evidence in the case that the decedent intended to make provisions for the objects of his bounty during his lifetime. If that had been his purpose, he could and would have made outright gifts to them, or would have made

provisions for the payment of the income to them during his lifetime, or otherwise made that purpose effective. The transfer he made makes absolutely no provision for them during his lifetime.

But the petitioners assert that the purpose to protect the decedent's property, "in order [as the court below said] to make certain that it would be used for his daughter and her children after his death," could not be achieved by a testamentary disposition (Br. 11); that "It [the Government] admits that the gift accomplished something that could not be accomplished by will, and that that something was the motive causing the transfer at the time it was made." (Br. 45.)

Presumably the petitioners intend to imply that no transfer can be a substitute for a testamentary disposition if it subserves some purpose which cannot be accomplished by a will. We submit that there is no merit in such a contention. The mere fact that a will alone is inadequate to assure the accomplishment of its purposes does not lead to the conclusion that a substitute instrument, designed to make certain by more surely effective means that such purposes shall be accomplished, is not motivated by the same purposes. Obviously it is. If there were any merit in the petitioner's contention, no *inter vivos* transfer could ever be a substitute for a will, for in the very nature of things every such transfer subserves some purpose which a testamentary disposition could not possibly subserve. No

one would contend that a gift *causa mortis* is not made in contemplation of death, and yet the full purposes of such a gift obviously could not be served by a will. See *Basket* v. *Hassell*, 107 U. S. 602, cited in *United States* v. *Wells*, *supra*, at p. 116. Nor do the petitioners question that a transfer made in order to avoid the tax falls within the provisions of the statute, for they repeatedly insist that the transfer here was not made for that purpose (Br. 4, 10, 47); to the contrary, they contend that a purpose to avoid the estate tax is a criterion for the imposition of that tax (Br. 13). And yet, a testamentary disposition obviously can not subserve that purpose.

The petitioners rely upon the *Becker* case. They contend (Br. 27) that there is an analogy between the motives in that case and those here. They say that the motives to make children independent and to avoid high surtaxes on the decedent's income in that case are to be compared with the motive here to save a part of his property from loss, and that in both cases a remote motive existed, namely, to provide for the decedent's children at death, evidenced by the provisions of the trusts.

The difficulty with this supposed analogy is that in the *Becker* case the Court said there was an entire absence of evidence to show the motive to provide for children at death, the inference being that the mere provision in the instrument for the devolution of the corpus upon them at his death was not in itself sufficient to show that the decedent

was in any wise motivated by a purpose to provide for them at death. Hence the Court said that the only purposes disclosed were to make his children independent and to avoid surtaxes during his lifetime. It is to be observed in this connection that in stating the supposed analogy, the petitioners wholly fail to state the full purpose of the decedent as declared by him to the trust officer, namely, that he desired to conserve the property only in order that he might provide for his daughter and her children after his death.

We think that this Court would not have sustained a reversal of the judgment of the District Court in the *Becker* case if in that case the decedent had provided for the accumulation of the income during his lifetime and had stated that his motive for making the transfers was to provide for his children after his death, and that the avoidance of surtaxes during his lifetime was sought merely in order to accomplish that purpose more generously.

We submit therefore that the decedent's only purpose in making the transfer in this case, which is disclosed by the undisputed evidence, was to provide for his daughter and her children at or after his death, or, to put it another way, to make sure provision for them after his death.

We turn to the question whether the motive to provide for the objects of bounty at death is immaterial.

(b) The contention that a transfer springing from the purpose to provide for the objects of bounty at death is not made in contemplation of death seems to us to run counter to all of the decisions of this Court, and particularly to that in *Milliken* v. *United States*, 283 U. S. 15, and that in the *Wells* case, *supra*. While in the *Milliken* case the only question was whether Congress had the power to require the inclusion in the gross estate of property transferred in contemplation of death, the basis of decision that it did have such power was that such transfers were mere substitutes for testamentary dispositions. In this connection, the Court said (p. 23):

> It is sufficient for present purposes, that such gifts are motivated by the same *considerations* as lead to testamentary dispositions of property, and made as *substitutes* for such dispositions *without awaiting death*, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. [Italics supplied.]

This case was decided at the same term as the *Wells* case, the decision being rendered only a few days before the *Wells* case was argued. It is relied upon in the *Wells* case, together with *Nichols* v.

*Coolidge*, 274 U. S. 531, as authority for the proposition that the dominant purpose of Congress was to reach such substitutes, in order to prevent the evasion of estate taxes. Hence in the *Wells* case, the Court said, almost in the same language used by it in the *Milliken* case (p. 117):

> As the transfer may otherwise have all the indicia of a valid *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is, the motive which induces the transfer must be *of the sort* which leads to testamentary disposition. [The second italics are supplied.]

We believe there is no difference in the thought which the Court sought to express in the two cases.

But the motive which normally leads to testamentary disposition is the purpose to provide for the objects of bounty at death, and we think there can be no question that this is the motive the Court referred to in both cases. This is the view of the lower Federal courts. See, e. g., *Igleheart* v. *Commissioner, supra; Updike* v. *Commissioner*, 88 F. (2d) 807 (C. C. A. 8th); *Willcuts* v. *Stoltze, supra.* Cf. *Heiner* v. *Donnan, supra*, and *Becker* v. *St. Louis Union Trust Co., supra.* If we are correct in this, then a transfer which is motivated by that purpose is obviously made in contemplation of death within the meaning of the statute.

Nevertheless, the petitioners contend it is immaterial that the transfer here springs from a pur-

pose to provide for objects of bounty at dea
The basis of the contention seems to be that a
motive is common to all men irrespective of
or health, and the petitioners ask the Court to c
clude from this fact, without more, that in holdi
the transfer here to have been made in contemp
tion of death, the court below confused contemp
tion of death with the expectation of death comm
to all men. (Br. 9, 12).

This contention flies in the teeth of the *Wells* a
*Milliken* cases. Its fallacy lies in the fact that
assumes that this motive is always present as
motivating factor, because it is one common to
men. This, of course, is not so; it may or may n
be present as an actively motivating factor in
given instance. In the case at bar, it not only w
present, but was the motive without which t
transfer would not have been made. As has a
ready been pointed out, the evidence complete
fails even to suggest that the transfer would hav
been made except for that purpose. This, alon
we submit, is sufficient to bring the transfer withi
the statute.

We have already pointed out also that ther
is here a definite and inseparable connectio
between the decedent's purpose "to save a par
of his fortune from loss in the stock market,
as the petitioners put it (Br. 27), and the purpos
to provide for the decedent's daughter and he
children after his death. The former is entirely de
pendent upon the latter. By placing a part of hi

property in "an asylum of immunity from adverse consequences of speculation," as the court below said (R. 54), the decedent merely implemented his purpose to provide for his daughter and her children after his death. Consequently there is no analogy on this point between the case at bar and the *Becker* case, for there is no connection between the purpose in that case to make children independent or one to avoid high surtaxes and the purpose in this case to provide for them at death. The Court found no evidence of the latter motive in the *Becker* case. Here its existence is shown by undisputed evidence. In short, there is no difference, either in character or quality between a purpose to make provision for objects of bounty at death and a purpose, expressed in the instrument which provides for the objects of bounty, to conserve property against casualty in order to insure that the provision will be effective.

We submit therefore that the decedent's impelling, controlling, inducing, actuating, dominating motive for the transfer was to provide for his daughter and her children at or after his death; that this was the immediate and moving cause for the transfer for it was the reason, and the only reason, for conserving the property—for placing it in an asylum of immunity so that it could in no wise be affected by any adverse results of the decedent's intended speculations. In every sense this transfer was a substitute *pro tanto* for the will that the decedent had theretofore made. He made

such substitute without awaiting death because he realised that to have awaited death might have permitted the defeat of the purpose. Hence we think it abundantly clear that the motive or purpose was one associated with death and not with life within the meaning of both the *Milliken* and the *Wells* cases. In the language of the *Milliken* case (p. 23), it was of the kind of dispositions which are "motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective"; and, in the language of the *Wells* case (p. 117), it was "of the sort which leads to testamentary disposition."

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The petitioners' contention that the motive to provide for objects of bounty at death is immaterial has left them no choice but to contend that, in order to bring an *inter vivos* transfer within the purview of the statute (Br. 46),

> The transfer must be brought about by fear or thought of death arising from bodily or mental conditions conducive thereto—usually ill health.

The petitioners make substantially the same contention here and there throughout their brief. (Br. 8, 9, 11, 12, 13, 38.) The contention is predicated solely upon language contained in estate tax regulations promulgated before the decision in the *Wells* case, under the Revenue Acts of 1918, 1921, 1924,

and 1926, namely, 37, 63, 68, and 70, to the effect that a transfer is made in contemplation of death "wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty."[1] But it is clear that these regulations did not confine the definition of contemplation of death to such expectation. Nothing in the *Wells* case justifies that conclusion. It is to be noted that the Court there had before it the applicable provisions of Regulations 37 and cited them in full in note 12 in support of the text on p. 115. Furthermore, *McCaughn* v. *Real Estate Co.*, 297 U. S. 606, 607, could not have been decided as it was if the thought of death arising from bodily or mental conditions conducive thereto had been the final criterion of taxability.

In these circumstances, we submit the argument of the petitioners is pointless that "It is too late for the Department or the courts to make a new and different definition," because the administra-

[1] Regulations 80, promulgated after the decision in the *Wells* case, substitutes for this, language taken from the *Wells* case to the effect that the phrase "contemplation of death" as used in the statute is not limited to a contemplation of imminent death or to an apprehension that death is near at hand; that death must be "contemplated," that is, the motive which induces the transfer must be such that leads to testamentary disposition; that a gift *inter vivos* which springs from a motive essentially associated with life rather than with death is not made in contemplation of death. (Appendix, *infra*, p. 43.)

[illegible] definition of contemplation of death contained therein is asserted to have been "approved by repeated congressional enactments of the law and by this court." (Br. 6-8.) The Government does not here seek a new definition of contemplation of death. It seeks simply to apply to the undisputed facts in this case the definition given by this Court in the *Milliken* and *Wells* cases.

## CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
*Solicitor General.*

JAMES W. MORRIS,
*Assistant Attorney General.*

SEWALL KEY,
CARLTON FOX,
*Special Assistants to the Attorney General.*

OCTOBER 1943.

## APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *. (U. S. C., Title 26, Section 411.)

Pub. Res. No. 131, approved March 3, 1931, c. 454, 46 Stat. 1516:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of subdivision (c) of section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income

from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth." (U. S. C., Title 26, Sec. 411.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (U. S. C., Title 26, Section 411.)

Treasury Regulations 80 (1934 Ed.):

ART. 16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

A transfer in contemplation of death is a disposition of property prompted by the thought of death. The phrase "contemplation of death" as used in the statute is not limited to contemplation of imminent death or to an apprehension that death is near at hand. Death must be "contemplated," that is, the motive which induces the transfer must be such that leads to testamentary disposition. A gift inter vivos which springs from a motive essentially associated with life rather than with death is not made in contemplation of death.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1938

# Supreme Court of the United States

OCTOBER TERM, 1938.

No. 30.

THE COLORADO NATIONAL BANK OF DENVER and GERTRUDE HENDRIE GRANT, Executors of the Estate of Edwin B. Hendrie, deceased,

*Petitioners,*

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

## MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*.

C. ALEXANDER CAPRON,
CHARLES ANGULO,
PHILIP M. PAYNE,
*Amici Curiae.*

THE COURT PRESS, N. Y. C.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

---

## *Motion for Leave to File a Brief as Amici Curiae.*

MAY IT PLEASE THE COURT:

The undersigned respectfully move this Honorable Court for leave to file the accompanying brief in this case, as *amici curiae*.

C. ALEXANDER CAPRON,
CHARLES ANGULO,
PHILIP M. PAYNE,
*Amici Curiae.*

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*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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## BRIEF OF AMICI CURIAE.

This brief, by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae* and on behalf of trusts not wholly dissimilar to those involved herein, for whom the undersigned are counsel.

It is presented in support of petitioners' contention that the trust fund in suit is not subject to the federal estate tax as one made "in contemplation of death".

We shall limit our discussion to what we conceive to be the underlying fallacy which pervades the Government's whole argument.

In the last analysis, what the Government is seeking is to have this Court depart from its ruling in the *Wells* case (283 U. S. 102) that the question of whether or not a transfer is made "in contemplation of death" is essentially a question of *fact* to be determined in the light of all the circumstances of the particular case.

The ultimate inquiry, of course, is as to the "state of mind" of the donor. Necessarily that state of mind can only be known as it may be *deduced or inferred* from his acts and declarations, and the other relevant circumstances of the case. These acts, declarations and the other circumstances, however, are merely *evidentiary* in their nature, and the ultimate question must always remain whether or not the "thought of death" was the controlling motive for the transfer. This of course is a question of fact.* (*McCaughn* v. *Real Estate Trust Co.*, 297 U. S. 606, 608.)

Hence there is no single circumstance, or set of circumstances, which can be said to be decisive and to establish as a *matter of law* in all cases, the presence of the particular state of mind which brings the transfer within the scope of the statute.

As was stated in the *Wells* opinion, at page 119:

> "There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus to give effect to the manifest purpose of the statute."

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* Of course, under the decisions, the question of whether there is any substantial evidence to support a finding of fact is a question of law. Certainly in the instant case, where the two-year statutory presumption does not operate, it may not be said that there was no substantial evidence to support the finding of the Board of Tax Appeals that the transfer was not made in contemplation of death.

In reality what the Government is asking is that certain inferences be drawn as a *matter of law* from given circumstances which in their nature are purely *evidentiary*. In other words, the Government wishes this Court to lay down the rule that the presence of the state of mind to which the statute is directed, must necessarily be inferred as a *matter of law*, because of the existence of a particular circumstance, even though such circumstance is at least consistent with a different motive.

Thus in the instant case, the Government in effect contends that the single circumstance that actual payments of income to the daughter were not to commence until the donor's death, results as a *matter of law* in making the trust one created "in contemplation of death". But it would seem obvious that the significance of that particular circumstance cannot be determined as a *matter of law*. Conceivably, at least, the selection of the time at which the payments of income to the daughter, were to commence was of secondary significance in the settlor's mind. The controlling motive for the transfer may have been to gratify his craving to speculate, unhindered by any conscientious scruples as to the moral obligation that he owed to his daughter and her children; whereas the *precise* terms of the particular provision to be made for them may have been viewed by him as being merely of secondary importance. Conceivably too, the selection of the date of death as the time at which the actual payments of income were to commence may have been motivated by a desire to preclude any claim on the part of future creditors that the trust was a mere colorable device under which donor's daughter would make the income available to him during his lifetime. What actually was the

significance of the selection of said date must be inferred from all the circumstances of the case; and thus it cannot be said that as a *matter of law* the presence of that particular circumstance establishes that the donor's controlling motive was the "thought of death".*

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*The Circuit Court of Appeals in its opinion in the instant case said:

> "The dominant purpose was to make provision for his descendants *after his death*, in the event his speculations proved tragic" (95 F. (2d), 160, 163, italics supplied).

It is respectfully submitted that in making the said statement the Circuit Court of Appeals was making a determination of fact. In reality what it was doing was scrutinizing and weighing the evidence and inferring therefrom that the deceased in his mind attached *controlling* significance to the selection of the date of his death as the time at which the actual payments of income to the daughter were to commence. As we have seen, it is at least conceivable that this may have been of minor significance in the settlor's mind. Conceivably the controlling consideration was to enable him to squander the rest of his fortune in speculation or otherwise, free from any moral qualms as to the obligation which he owed to his daughter and her children, and that the precise terms or form of the provision to be made for them was of minor significance. It would seem to be obvious, therefore, that the ultimate determination as to the donor's state of mind must necessarily depend upon the inferences which are drawn from all of the evidence in the case.

Incidentally, in the course of the opinion of the District Court in *Land Title & Trust Co.* v. *McCaughn*, 7 F. Supp. 742, 744, it seems to have been assumed, as being more or less obvious, that if a trust is created because "the donor mistrusts his own ability to take care of his property until his death and wishes to put it out of the way of dissipation by himself as well as his heirs", the motive is one associated with life, although not necessarily inconsistent with the existence of a contemporaneous "death" motive. Of course, it should be noted that in the *McCaughn* case the transfer was made within the two-year period.

The same fallacy is involved in the Government's argument that where the provisions of the trust instrument are similar to the provisions of the donor's will, the trust thereby becomes, as a *matter of law*, one made "in contemplation of death". Here again we submit that the similarity between the provisions of the trust instrument and the donor's will is merely a single circumstance which must be considered in connection with all of the other circumstances of the particular case, in order to ascertain whether the dominant motive for the transfer was the thought of death or whether the donor was actuated by some other motive desirable to him in life. In one sense, every transfer *inter vivos*, especially if the beneficiary was also the beneficiary under a pre-existing will, necessarily is a substitute in part for a testamentary disposition. But this manifestly is not the sense in which those words were used in the *Wells* and *Milliken* cases (283 U. S. 15, 102). As already stated, the statute requires the existence of a certain state of mind; and it is self evident that that state of mind may or may not exist notwithstanding that the provisions of the trust instrument are similar to those contained in a prior will of the settlor.

While the Government concedes (Brief, p. 19) that there is no evidence in the case at bar of any desire to avoid estate taxes, it nevertheless argues that a desire to avoid or minimize estate taxes would, if present, in and of itself and as a matter of law, constitute the transfer one "in contemplation of death." That argument has nothing whatever to do with this case. Possibly, the presence of any

such desire, would, like any other circumstance, be one to be considered and given its due weight in connection with all of the other circumstances of any particular case in which the question might be involved.

And so, we submit that, as stated in the extract from the *Wells* opinion which we have quoted above, there is no escape from the necessity of considering all of the circumstances of the particular case and deducing in the light thereof whether the "thought of death" was the dominant motive for the transfer. That, we submit, is essentially a question of *fact* to be determined by the trial tribunal.

The only circumstances to which the Government points as tending to support its contention that the transfer was made in contemplation of death are the following: (i) decedent's age at the time of the transfer (R. 33); (ii) the terms of the trust by which the transfer was made providing for the accumulation of the income until after the donor's death (R. 11); and (iii) that the decedent's will, executed on January 26, 1925 (R. 47), which was nearly two years before the transfer was made (R. 35), left his residuary estate to trustees for the benefit of his daughter and grandchildren, and their descendants, upon substantially the same terms set forth in the deed of trust by which the transfer was made (R. 45, 46).

This Court has determined that none of such circumstances establishes, as a matter of law, that a transfer was made "in contemplation of death".

As to the first, this Court said: "Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer". *United States* v. *Wells*, 283 U. S. 102, 118. In the instant case it is not disputed that the donor was in sound health at the time of the transfer and lived over five years thereafter.

Similarly, this Court has held that, for the purpose of determining whether property transferred should be subjected to the estate tax, an absolute, complete and irrevocable gift *inter vivos* of a future interest* is of the same effect as an absolute gift of a present interest. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348. See, also, *Welch* v. *Hassett*, 90 F. (2d) 833, 839; *Frew* v. *Bowers*, 12 F. (2d) 625, 627.

Specifically this Court has held that a transfer in trust, with power in the trustee to accumulate income during the settlor's life, and to distribute the same upon his death, was not evidence that, in making the transfer, the donor was in any way influenced by the thought of death. In *Becker* v.

*In the instant case of course, a trust for the benefit of the daughter was irrevocably created at the time the trust instrument was signed. The donor reserved no interest in the trust. The transfer to the trustee was absolute and unconditional, and was for the benefit of the daughter. The only connection between the trust and the date of the donor's death was that that was the date selected as the time when the payments of income to the daughter were to commence, the income in the meanwhile being accumulated for the benefit of herself and her children.

*St. Louis Union Trust Co.*, 296 U. S. 48, the trust instrument left it to the discretion of the trustee (who was also the settlor) whether the income should be accumulated during the life of the settlor or distributed to the beneficiary (76 F. (2d) 851, 853), and further provided that in the event the settlor predeceased the beneficiary, the trust property (both principal and accumulated income) upon the death of the settlor should be absolutely distributed to the beneficiary. The District Court found that the motive of the decedent in creating the trust was to minimize his income tax "and at the same time to make provision for the distribution of the property to his children at decedent's death" (Commerce Clearing House Standard Federal Tax Service, Vol. III-A, 1934, pp. 9717-9718, 19210). Nevertheless, the Circuit Court of Appeals held that evidence that the decedent was in any way influenced in what he did, by the thought of death, was entirely lacking, and this Court said (296 U. S. 48, 52): "We are unable to find anything in the record which conflicts with the statement of the court below that evidence that the decedent was in any way influenced by the thought of death was wholly lacking."

Similarly this Court has held that "the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend" does not change the character of an irrevocable transfer. *Shukert v. Allen*, 273 U. S. 545. See, also, *Boyd* v. *United States*, 34 F. (2d) 488, 490.

There remains for consideration the question whether the similarity between the provisions of the deed of trust by which the transfer was effected and the provisions of the will previously executed by the donor is a circumstance from which it must be held, as a matter of law, that the transfer was made

"in contemplation of death". The decisions of this Court and of other lower federal courts are to the contrary. In the *Wells* case this Court mentioned (p. 109) the provisions of the testator's will, which had been executed by him before the date of the transfer there in question. Under the provisions of that will, the benefits which the children would have derived would have been substantially the same as those received by them as the result of the gifts in question, plus the amount which they received under the testator's will. The decedent there died within two years of the date of the transfer and the Commissioner assessed an additional estate tax with respect to the property so transferred. Notwithstanding this, the Court of Claims held (69 Ct. Cls. 485) that the transfer was not made in contemplation of death; and this Court refused to disturb that determination, in effect holding that none of the circumstances there presented required the conclusion that, as a matter of law, the transfer had been made in contemplation of death.

The decisions of other lower federal courts are to like effect. Thus, in *Tait* v. *Safe Deposit and Trust Co.*, 74 F. (2d) 851, the Circuit Court of Appeals for the Fourth Circuit held that a transfer was not made "in contemplation of death", notwithstanding the fact that it was made to the grantor's wife, who was the chief beneficiary under the grantor's will. And in *Poor* v. *White*, 8 F. Supp. 995, the court said: "The fact that upon the final distribution the property would go to her descendants after the death of the survivor of the beneficiaries is not enough to justify a finding that the transfer was made in contemplation of death, within the meaning of the statute imposing estate taxes" (p. 996). The decision was affirmed, 75

F. (2d) 35; 296 U. S. 98. See, also, *Estate of Sharp v. Commissioner*, 30 B. T. A. 532, 541.

The circumstance that the property was transferred by the donor to those persons who would have received it under a will previously executed, or that the property was transferred to the natural objects of the donor's bounty to be provided for by his will, may be a circumstance which should be considered by the triers of the fact, but it is not a conclusive test by which a determination may be reached as a matter of law, that the transfer was made "in contemplation of death".

We submit that such circumstance is of slight significance in most instances, for it would be strange to find an *inter vivos* gift of a material portion of one's property to others than the natural objects of the donor's bounty—to those who are dependent upon him and for whom he desires to make provision not only during his life but after his death. It must be expected that a person who creates an *inter vivos* trust will select as the beneficiaries the same persons whom he mentions in his will. When future estates are created, there can be but slight difference between the provisions of an *inter vivos* trust and a testamentary trust creating such future estates. The use of substantially the same language (if income beneficiaries and remaindermen be the same) is inevitable and unavoidable.

In order to escape the charge that a trust established *inter vivos* is "a substitute for a testamentary disposition", it is not necessary for one to change the beneficiaries of the trust or the character of the benefits conferred upon such beneficiaries.

The argument, that the single circumstance that the gift is made to one who is the natural object of

the donor's bounty, *ipso facto* and as a matter of law makes the gift one made in contemplation of death, is clearly without merit. Such an argument leads to this absurd conclusion—that although a gift would not be within the statute if made to a stranger under circumstances, which concededly would not render it one made in contemplation of death, nevertheless, if made under identical circumstances to a person who is the natural object of the donor's bounty, such gift would by reason of that fact alone become one in contemplation of death.

The Government urges (Brief, pp. 13, 15, 30) that "the transfer was a mere substitute *pro tanto* for the disposition he had previously made by will". Because of this fact the Government apparently urges that, as a matter of law, the transfer must be deemed "a substitute for a testamentary disposition", which this Court has held it was the purpose of the statute to reach. *Milliken* v. *United States,* 283 U. S. 15, and the *Wells* case, *supra.* However, it is apparent that this Court has used the term "substitutes for testamentary dispositions" with precision. It has recognized that the essential difference between an absolute transfer *inter vivos* and a "testamentary disposition" is the ambulatory character of the latter; and that if, through reserved powers of revocation or amendment, the gift of the beneficial interest under an *inter vivos* transfer remains ambulatory until the death of the donor, such transfer may be deemed a substitute for a testamentary disposition and the property so transferred should not escape the burden of the estate tax. *Helvering* v. *Bullard,* 303 U. S. 297, 301-2; *Porter* v. *Commissioner,* 288 U. S. 436, 444; *May* v. *Heiner,* 281 U. S. 238, 243; *Chase National Bank* v.

*United States*, 278 U. S. 327, 338; *Bullen* v. *Wisconsin*, 240 U. S. 625, 631. And in *Matter of Schmidlapp*, 236 N. Y. 278, the late Mr. Justice Cardozo said:

> "We think this conveyance was so far ambulatory until the death of the donor that rights acquired under it might be taxed as if acquired under a will" (p. 285).

We submit that the essential feature of a testamentary disposition is that it is ambulatory, and that a substitute for a testamentary disposition must include this ambulatory feature or else the "thought of death" must have been the controlling motive for its surrender; or, in other words, the transfer must have been made "in contemplation of death", as defined in the *Wells* case.

***It is therefore submitted that the decision of the Circuit Court of Appeals should be reversed.***

Respectfully submitted,

C. ALEXANDER CAPRON,
CHARLES ANGULO,
PHILIP M. PAYNE,
*Amici Curiae.*

Dated, October 19, 1938.

P. 3. dissent

# SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1938.

The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Petitioners,
*vs.*
Commissioner of Internal Revenue.

Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[November 7, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Edwin B. Hendrie of Denver, Colorado, January 26, 1925, executed a will wherein he gave his property, with relatively small exceptions, to trustees to be held for the benefit of his daughter, Gertrude Hendrie Grant, and her children. January 7, 1927, when eighty years old and in good health, he irrevocably conveyed in trust to the Colorado National Bank, securities of large value—perhaps $800,000. The deed among other things provided that the income should be accumulated during the donor's life; after his death and during the life of his daughter Gertrude so much thereof as she asked should be paid to her and the remainder added to the principal; upon her death the corpus should be distributed to her descendants, etc.

Hendrie died July 15, 1932. His 1925 will was duly probated and under it property worth some $900,000 passed. The Commissioner ruled that the 1927 trust was set up in contemplation of death within the meaning of section 302(c), Revenue Act of 1926, as amended,[1] treated the property in the trustee's hands as part of the gross estate, and assessed taxes thereon accordingly.

[1] Revenue Act of 1926, c. 27, 44 Stat. 9:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . ." (U. S. C., Title 26, Section 411.)

The Board of Tax Appeals considered the relevant facts and held the conveyance of 1927 "was not made in contemplation of death within the meaning of the statute as explained in United States v. Wells, 283 U. S. 102."

The Circuit Court of Appeals ruled that the transfer was in contemplation of death, and reversed the Board's decision. We think this was error. The decision of the Board should have been approved.

The court declared—"Each case must be determined by its own facts and circumstances. . . . It is settled law that a finding of fact made by the Board of Tax Appeals will not be disturbed on review if it is supported by substantial evidence. But whether there is substantial evidence to support a finding is a question of law. . . . And a finding not thus supported will be set aside." These statements are in accord with our holdings.

Also it said—"The test lies in the motive for the transfer. If the generating source of the motive is associated with life, the transfer is not made in contemplation of death. But if the generating inducement is associated with death, either immediate or distant, the transfer is made in such contemplation. A gift is made in contemplation of death where the dominant motive of the donor is to make proper provision for the object of his bounty after the death of the donor."

Following a review of the evidence it said—"The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. . . . The purpose was a commendable one, but the generating motive for a transfer made in such circumstances is associated with death."

In the light of the views so stated the court concluded there was no substantial evidence to establish that the transfer was not made in contemplation of death. One judge, dissenting, declared—"It seems clear from the uncontradicted testimony that Mr. Hendrie's gift to his daughter and her children was not made in contemplation of death but in order that he might speculate upon the stock market

for the remainder of his life more actively than he had in the past without fear that the part of his fortune thus given might be lost. He manifested no other intent and purpose in that respect."

There was evidence which the Board thought adequate, and which we deem substantial, to support its conclusion. Dominant purpose was a question of fact for determination by the Board.

The court's opinion seems to rest upon an erroneous interpretation of the term "in contemplation of death." The meaning of this was much discussed in *United States* v. *Wells, supra.* We adhere to what was there said. The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was "in contemplation of death." Broadly speaking, thoughtful men habitually act with regard to ultimate death but something more than this is required in order to show that a conveyance comes within the ambit of the statute.

Here, the Board having before it all the circumstances, including the provisions of the will, concluded that they disclosed an effective motive not directly springing from apprehension of death. And as pointed out by the dissenting judge there was substantial basis for that view. Its action is in accord with principles accepted by us in *Shukert* v. *Allen,* 273 U. S. 545, *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, *May* v. *Heiner,* 281 U. S. 238, *McCormick* v. *Burnet,* 283 U. S. 784, *Becker* v. *St. Louis Union Trust Co.,* 296 U. S. 48.

The judgment of the Circuit Court of Appeals must be reversed. The decision of the Board of Tax Appeals is approved.

Mr. Justice REED concurs on the ground that the conclusion of the Board that the transfer was not made in contemplation of death was justified. There was substantial evidence of a life motive and the Board did not find an effective motive in contemplation of death.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

# SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1938.

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| The Colorado National Bank of Denver and Gertrude Hendrie Grant, Executors of the Estate of Edwin B. Hendrie, Deceased, Petitioners, vs. Commissioner of Internal Revenue. | Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit. |

[November 7, 1938.]

Mr. Justice Black, dissenting.

The purpose of Congress in providing that property transferred to a trust should be included in the transferor's gross estate when transferred in contemplation of death[1] was to prevent evasion of the progressively graduated estate tax through the use of trust devices which actually operated as substitutes for testamentary disposition of property.[2] The will made by Mr. Hendrie at the age of seventy-eight in 1925 and the trust agreement substituted for it at eighty (as to a large part of his property) two years later in 1927 were substantially identical as to parties, recipients of his property, amounts, terms and conditions. Neither the will nor the trust agreement permitted any payments to the beneficiaries until the death of Mr. Hendrie.

The stipulated evidence as to expressions by the donor of his motive for making the trust agreement showed that:

He "wanted to transfer about one third of his assets in the interest of his daughter and her heirs so that whatever might happen to his own financial affairs in the future, those persons would be provided for. He said he desired to retain for himself his most speculative securities and to feel free to speculate with that property *during the rest of his life*, but to put the other one-third beyond his own reach and risk. He said he desired and intended to 'play on the market' to a greater extent and in a more speculative way *for the remainder of his life*." (Italics supplied.)

[1] Sec. 302(c), Revenue Act of 1926, 44 Stat. 9.

[2] Milliken v. United States, 283 U. S. 15; United States v. Wells, 283 U. S. 102, 116-17; cf. Tyler v. United States, 281 U. S. 497, 505.

At "one time he stated . . . that his daughter and his grandchildren would be adequately provided for in the event of his, the said Hendrie's death, through the medium of a trust which he had created, regardless of his operations on the Stock Exchange."

In reaching the conclusion that the stipulated facts in this case showed as a matter of law that the trust gift was made in contemplation of the donor's death within the meaning of the congressional act, the court below said in part:

"The trust was not designed to make provision for the beneficiaries during his life. None of the property or the increment thereto was to reach them until after his death. Neither was it designed to enable him to engage in speculation. He could have done that unfettered and unrestrained without the establishment of the trust. But in its absence the property transferred would have been subject to the hazards of speculation. It would have been within reach of creditors if he lost all. The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life, but after his death."[3]

The Board of Tax Appeals did not pass upon conflicting evidence. And there is no indication that the Board believed that any conflicting inferences could be drawn from the stipulated facts. Stating that "the Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were to receive nothing until after the death of the decedent" the Board did no more than say that they thought "the transfer was not made in contemplation of death within the meaning of the statute as explained in *United States* v. *Wells*, 283 U. S. 102" and that "Therefore, on this point, we hold for the petitioners." That the Board reached its conclusion on this single principle is clearly indicated by its statement that "Principles announced in the cases above listed control this case which is not distinguishable from one or more of those cases where, as here, *income was to be accumulated until after the death of the donor.*" (Italics supplied.)

[3] 95 Fed. (2d) 163.

The decision in *United States* v. *Wells, supra,* is not controlling on the present facts. There the Court held that the gift involved "was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly thirty years and the three transfers in question were a continuation and final consummation of such policy. In the last transfer such amounts were given to his children as would even them up one with another, in the gifts and advancements made to them.

"That this was the motive which actuated the decedent in making these transfers seems unquestioned."

Here, the donor had never followed any such policy. His will indicated that he was motivated not by a desire to give his children and grandchildren property while he was yet living, but to provide for them after his death. In the *Wells* case, *supra,* 117, this Court said that "the motive which induces the transfer must be of the sort which leads to testamentary disposition". That the motive of the donor in this case was of the kind "which leads to testamentary disposition" is conclusively shown by the facts that the trust agreement was an actual substitute for a previous will; that the sole motive shown in *all* of the evidence was to provide for the donor's children and grandchildren after his death so he would be "free for the rest of his life to speculate in whatever securities he might wish" without subjecting the property intended for his children and grandchildren to "the vicissitudes of his speculations."[4]

Congress has provided that upon review of a judgment by the Board of Tax Appeals the "Courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding

[4] The statute alternatively taxes two types of trust transfers *inter vivos* which may be substituted for wills. If a trust was intended to take effect at death or if a trust was created in contemplation of death, *either* contingency invokes the imposition of the tax. Holdings where the tax has been assessed on the theory that a trust shifted such economic interests at a transferor's death—and not when the trust was set up—that the transfer was intended to take effect at death (Shukert v. Allen, 273 U. S. 545; Reinecke v. Northern Trust Co., 278 U. S. 339; May v. Heiner, 281 U. S. 238; McCormick v. Burnet, 283 U. S. 784; Becker v. St. Louis Union Trust Co., 296 U. S. 48) are not determinative of this case involving an alleged motive in contemplation of death.

pointed out that, in effect, the findings of the lower court showed that

the case for a rehearing, as justice may require."[5] Although t statute indicates an intent on the part of Congress to make t findings of fact of the Board conclusive, this Court holds that su findings are not conclusive unless supported by substantial e dence.[6] This Court has also said that the ultimate finding by Board of Tax Appeals is a "conclusion of law or at least a det mination of a mixed question of law and fact" which is "subj to judicial review and, on such review, the Court may substitute judgment for that of the board."[7] Under this rule—with whic am not in accord—but which governed the Court of Appeals, I lieve that Court correctly decided that the Board had no substan evidence to justify its erroneous ultimate determination of mixed question of law and fact here. For that reason I think judgment should be affirmed.

[5] 44 Stat. 110, 26 U. S. C., ch. 5, § 641(c).

[6] Helvering *v.* Tex-Penn Co., 300 U. S. 481, 490; Helvering *v.* Rankin, U. S. 123, 131; Phillips *v.* Commissioner, 283 U. S. 589, 600.

[7] Helvering *v.* Tex-Penn Co., *supra*, at 491; Helvering *v.* Rankin, *supra*